

*United States Court of Appeals
for the Second Circuit*



APPENDIX

orig

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-2367

ITT WORLD DIRECTORIES INC.,
Plaintiff-Appellant,
-against-
CIA EDITORIAL de LISTAS, S.A.
and EDITORIAL de GUIAS LTB.,
S.A.,
Defendants-Appellees.

B
PLS

APPENDIX

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Plaintiff-Appellant
Office & Post Office Address
200 East 42nd Street
New York, New York 10017
Telephone: (212) 986-6272

BROWN, WOOD, FULLER, CALDWELL
& IVEY
Attorneys for Defendants-Appellees
Office & Post Office Address
One Liberty Plaza
New York, New York 10006
Telephone: (212) 349-7500



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>PAGE</u>
Revelant Docket Entries	1a
Complaint	2a
Exhibit A - Agreement Dated July 9, 1969 Annexed to Complaint (Same as Plaintiff's Trial Exhibit 2 - Reproduced in Exhibit book)	9a
Answer	10a
Reply	16a
Stipulation of Facts (Same as Plaintiff's Trial Exhibit 1 - Reproduced in Exhibit Book)	18a
Pre-trial Order	19a
Trial Transcript	32a
Memorandum Decision	132a
Judgment	152a
Notice of Appeal	153a
Stipulation	154a

INDEX TO TRANSCRIPT

	<u>PAGE</u>
<u>JEREMY JAMES JERRAM</u>	
Direct	53a
Cross	72a
A <u>PLAINTIFF'S TRIAL EXHIBITS</u>	
Exhibit 1 - Stipulation of facts	51a
Exhibit 2 - Agreement Dated July 9, 1969	53a
Exhibit 3 - P.L.T. Publicacoes De Listas Telefonicas, S.A.R.L. Bertrand (Irmaos) Limitada Combined Balance Sheet	53a
Exhibit 4 - Letter Dated December 8, 1969 From Bertrand (Irmaos), LDA. to Arthur Andersen & Co.	69a
<u>DEFENDANTS' TRIAL EXHIBITS</u>	
Exhibit A - Bertrand (Irmaos) Limitada Balance Sheet as of August 3, 1968	74a
Exhibit B - Portugal Income and Expense Projections - June 30, 1969	125a

INDEX TO TRANSCRIPT

DEFENDANTS' TRIAL EXHIBITS

IN
EVID.

- Exhibit C - Letter Dated
May 23, 1969
From ITT World
Directories
Inc. to Arthur
Andersen & Co.** 93a
- Exhibit D - Telex Dated
August 5, 1969
From J.A. Hughes
to M. Soto and
J. Jerram** 95a
- Exhibit E - Telex From J.
Jerram to J.A.
Hughes** 95a
- Exhibit F - Telex Dated August
5, 1969 From M.
Soto and J. Jerram
to Brian Peoples
and J.A. Hughes** 98a
- Exhibit G - Letter Dated
August 18, 1969
From Arthur
Andersen & Co.
to ITT World
Directories Inc.** 99a

RELEVANT DOCKET ENTRIES

ITT WORLD DIRECTORIES INC.
VS. CIA EDITORIAL DE LISTAS,
S.A. ET ANO

<u>DATE</u>	<u>PROCEEDINGS</u>
Dec. 16-71	Filed Complaint. Issued Summons.
Aug. 31-72	Filed Defts' ANSWER to Complaint.
Oct. 10-72	Filed Reply to Counterclaim.
Feb. 14-74	Filed stip & order of stipulation of facts. So ordered CANNELLA, J.
Feb. 14-74	Filed consent and pre-trial order - CANNELLA, J.
June 27-74	Filed transcript of record of proceedings dated 2-13-74
Oct. 4-74	Filed Memorandum-Decision-Order-Opinion #41273 - Pltff's complaint is dismissed as to all defts. with prejudice and costs. As to the deft's counterclaim, is dismissed with prejudice. Let the Clerk of the Court enter judgment accordingly. So ordered - CANNELLA, J.
Oct. 8-74	Filed Judgment - ordered that defts. CIA Editorial de Listas, S.A. and Editorial de Guias Ltd., S.A. have judgment against pltff. ITT World Directories, Inc. dismissing the complaint with prejudice and costs to be taxed - and that the defts' counterclaim is dismissed, with prejudice. Clerk (m/n)
Oct. 11-74	Filed pltff's notice of appeal from judgment entered 10-8-74. Copy to Brown, Wood, Fuller, Caldwell & Ivey. Entered 10-11-74.
Oct. 30-74	Filed stipulation designating exhibits for the record on appeal.

COMPLAINT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

- - - - - x
ITT WORLD DIRECTORIES INC.,

: Plaintiff, COMPLAINT

: - against -

CIA.EDITORIAL de LISTAS, S.A.
-and-
EDITORIA de GUIAS LTB S.A.,

: Defendants.

- - - - - x
PLAINTIFF, by its attorneys, Cowan, Liebowitz &
Latman, for its complaint, alleges:

1. Plaintiff ITT World Directories Inc. is a
Delaware corporation with its principal office in the State
of New York at 280 Park Avenue, New York, New York 10017.
The matter in controversy exceeds, exclusive of interest and
costs, the sum of (\$10,000) Ten thousand dollars.

2. Upon information and belief, defendant CIA.
Editorial de Listas, S.A. (hereafter "CELSA") is a corporation
incorporated under the laws of Panama and has its principal
place of business at Av. Pres. Wilson, 165, Rio de Janeiro,
Brazil.

3. Upon information and belief, defendant Editorial
de Guias LTB S.A. formerly known as Listas Telefonicas Brasilerias
S.A. Pgginas Amarelas (hereafter "LISTAS") is a corporation in-
corporated under the laws of Brazil and has its principal place
of business at Av. Pres. Wilson, 165 Rio de Janeiro, Brazil.

COMPLAINT

FOR A FIRST CAUSE OF ACTION AGAINST
DEFENDANT CIA. EDITORIAL de LISTAS, S.A.

4. On or about July 9, 1969 a written contract, (hereafter the "Agreement of Sale"), a copy of which is annexed hereto as Exhibit A, was entered into between plaintiff and defendant CELSA and Tasec-Technical Advertising & Sales Engineering Corporation Limited.

5. Pursuant to the Agreement of Sale, defendant CELSA sold to plaintiff 100% of the shares of the capital stock of Publicacoes de Listas Telefonicas, S.A.R.L., a Portuguese corporation (hereafter "PLT") and the entire interest of defendant CELSA in Bertrand (Irmaos) Lda., a Portuguese quota company (hereafter "BERTRAND"), representing a 92.1% interest in BERTRAND.

6. Defendant CELSA warranted and represented in paragraphs 1.5 and 1.7 of Agreement of Sale certain facts to plaintiff.

7. Defendant CELSA has breached said Agreement of Sale and the warranties and representations in that (i) the combined balance sheet of PLT and BERTRAND as of May 31, 1969 did not fairly present the respective financial positions of BERTRAND as of May 31, 1969 and (ii) in that there was a material liability of BERTRAND for amounts to be paid in the future with respect to advances to certain of BERTRAND's quota holders which had not been accrued or properly reserved for in the financial statements of BERTRAND.

COMPLAINT

8. Plaintiff duly performed all the conditions
on its part to be performed pursuant to the Agreement of Sale.

9. Plaintiff relied upon the representations and
warranties referred to in paragraph 6 of this Complaint.

10. By reason of the foregoing breach of contract,
plaintiff has been damaged in the sum of \$353,997.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST
DEFENDANT CIA. EDITORIAL de LISTAS, S. A.

11. Plaintiff repeats the allegations set forth
in paragraphs "1" through "5" inclusive of this Complaint.

12. Pursuant to paragraph 3.6 of the Agreement of
Sale, a post closing payment was to be made based in part upon
the tangible net worth on a combined basis for 100% of PLT and
92.1% of BERTRAND as of May 31, 1969 as determined by an audit
in accordance with the provisions of said paragraph 3.6.

13. On October 31, 1969, plaintiff paid to defendant
CELSA the sum of \$803,239, of which the sum of \$492,221 the
plaintiff erroneously considered was the sum due defendant CELSA
for the tangible net worth of 100% of PLT and 92.1% of BERTRAND
on a combined basis.

14. Plaintiff thereafter ascertained that the proper
amount due defendant CELSA as payment for the tangible net worth
of 100% of PLT and 92.1% of BERTRAND on a combined basis pursuant
to paragraph 3.6 of the Agreement of Sale was only \$138,224. By

COMPLAINT

reason of the foregoing, plaintiff has erroneously overpaid defendant CELSA in the sum of \$353,997.

15. Plaintiff has demanded from defendant CELSA that it return to plaintiff the sum of \$353,997, which CELSA has refused.

16. By reason of the foregoing, defendant CELSA is indebted to plaintiff in the sum of \$353,997.

FOR A THIRD CAUSE OF ACTION AGAINST
DEFENDANT CIA. EDITORIAL de LISTAS, S.A.

17. Plaintiff repeats the allegations set forth in paragraphs "1" through "5" inclusive of this Complaint.

18. Pursuant to paragraph 6.1(d) of the Agreement of Sale, defendant CELSA agreed to reimburse and indemnify plaintiff for any direct or indirect losses resulting from payments required to be made by PLT and BERTRAND for certain employee indemnities to the extent payments required for such employee indemnities exceeded \$81,640, but in no event could CELSA's obligation to plaintiff pursuant to said paragraph 6.1(d) be more than \$81,640.

19. Plaintiff has made payments for employee indemnities in excess of \$200,000 as a result of which plaintiff is entitled to reimbursement by defendant CELSA in accord with 6.1(d) of the Agreement of Sale in the amount of \$81,640.

20. Plaintiff has demanded of defendant CELSA that it pay to plaintiff the sum of \$81,640, representing the amount of employee indemnities covered by the indemnity agreement made by defendant CELSA pursuant to paragraph 6.1(d) of the Agreement of Sale, but defendant CELSA has paid no part thereof.

21. By reason of the foregoing breach of contract, plaintiff has been damaged in the sum of \$81,640.

FOR A FOURTH CAUSE OF ACTION AGAINST
DEFENDANT CIA. EDITORIAL de LISTAS, S.A.

22. Plaintiff repeats the allegations set forth in paragraphs "1" through "5" inclusive of this Complaint.

23. Pursuant to paragraph 3.6(b) of the Agreement of Sale, plaintiff was to pay defendant CELSA 92.1% of the amount by which the \$600,000 appraised value of BERTRAND's Dafundo plant, less any capital gains tax (*mais valia*), transfer tax (*sisa*) and any other taxes that might be applicable to a sale of such property at such appraised value, exceeds the book value thereof as May 31, 1969.

24. Plaintiff in making the computation required by paragraph 3.6(b) of the Agreement of Sale to ascertain the payment due defendant CELSA for the BERTRAND Dafundo plant, erroneously computed 100% of the excess referred to rather than 92.1% as required by the Agreement, resulting in an overpayment by plaintiff to defendant CELSA of \$24,569.

COMPLAINT

25. Plaintiff has demanded of defendant CELSA that it repay to plaintiff the sum of \$24,569 representing the amount of the overpayment for the BERTRAND Dafundo plant, but the defendant CELSA has repaid no part thereof.

26. By reason of the foregoing, defendant CELSA is indebted to plaintiff in the sum of \$24,569.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST
DEFENDANT EDITORIA de GUIAS LTB S.A.

27. Plaintiff repeats the allegations set forth in paragraphs "1" through "10", "12" through "16", "18" through "21" and "23" through "26" inclusive of this Complaint.

28. In consideration of the plaintiff entering into the Agreement of Sale with defendant CELSA, the defendant LISTAS executed and delivered to plaintiff its guarantee in writing of the performance of defendant CELSA. Said guarantee appears on page 10 of the Agreement of Sale, a copy of which is annexed hereto as Exhibit "A".

29. Defendant CELSA breached said Agreement of Sale as hereinbefore set forth in the First, Second, Third and Fourth Causes of Action in this Complaint.

30. Plaintiff relied upon the guarantee of performance of defendant LISTAS in entering into the Agreement of Sale with defendant CELSA.

COMPLAINT

31. By reason of the foregoing, plaintiff has been damaged in the sum of \$460,206.

WHEREFORE, plaintiff demands judgment as follows:

1. On the First Cause of Action or Second Cause of Action against defendant CELSA the sum of \$353,997, plus interest from October 31, 1969;
2. On the Third Cause of Action against defendant CELSA in the sum of \$81,640, plus interest from the dates of payment by plaintiff;
3. On the Fourth Cause of Action against defendant CELSA in the sum of \$24,569, plus interest from October 31, 1969; ..
4. On the Fifth Cause of Action against defendant LISTAS in the sum of \$460,206; plus interest on the sum of \$353,997, from October 31, 1969, plus interest on the sum of \$24,569 from October 31, 1969, plus interest on the sum of \$81,640 from the dates of payment by plaintiff, together with the costs and disbursements of this action.

COWAN, LIEBOWITZ & LATMAN



A Partner

Attorneys for Plaintiff
200 East 42nd Street
New York, New York 10017
986-6272

**EXHIBIT A - AGREEMENT DATED JULY 9, 1969 -
ANNEXED TO COMPLAINT**

[SAME AS PLAINTIFF'S TRIAL
**EXHIBIT 2 - REPRODUCED IN
EXHIBIT BOOK]**

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

ITT WORLD DIRECTORIES, INC., : .

Plaintiff, : ANSWER

-against- : 71 Civ. 5496

CIA. EDITORIAL de LISTAS, S.A. : .

and

EDITORIA de GUIAS LTD. S.A., : .

Defendants. : .

- - - - - x

Defendants, Cia. Editorial de Listas, S.A.

(hereinafter "CELSA") and Editoria de Guias LTB. S.A.

(hereinafter "LISTAS"), by their attorneys, Brown, Wood,
Fuller, Caldwell & Ivey, answer the complaint herein as
follows:

1. Deny knowledge or information sufficient
to form a belief as to the truth of the allegations in
paragraph 1 of the complaint.

2. Admit the allegations in paragraphs 2 and
3 of the complaint.

Answer Of Defendant CELSA to
The First Cause Of Action

3. Admits the allegations in paragraphs 4, 5
and 6 of the complaint.

4. Denies each and every allegation in paragraphs
7, 8, 9 and 10 of the complaint.

Answer Of Defendant CELSA to
The Second Cause Of Action

5. For its answer to paragraph 11 of the
complaint, repeats and realleges each of its answers set
forth above in paragraphs 1 through 4.

6. Admits the allegations in paragraphs 12 and
15 of the complaint.

ANSWER

7. Denies each and every allegation of paragraph 13 of the complaint, except admits that on or about October 31, 1969 plaintiff paid to defendant CELSA the sum of \$803,239 pursuant to a substituted agreement between the parties.

8. Denies each and every allegation of paragraphs 14 and 16 of the complaint.

Third Cause Of Action

9. Inasmuch as the subject matter of plaintiff's third cause of action is presently in arbitration, defendant CELSA makes no responsive pleading to said cause of action at this time.

Answer Of Defendant CELSA To
The Fourth Cause Of Action

10. For its answer to paragraph 22 of the complaint, repeats and realleges each of its answers set forth above in paragraphs 1 through 4.

11. Admits the allegations of paragraphs 23 and 24 of the complaint.

12. Denies each and every allegation of paragraphs 25 and 26 of the complaint.

Answer Of Defendant LISTAS To
The Fifth Cause Of Action

13. For its answer to paragraph 27 of the complaint, defendant LISTAS adopts each of the answers of CELSA set forth above in response to paragraphs 1 through 10, 12 through 16, 18 through 21 and 23 through 26 of the complaint.

14. Denies each and every allegation in paragraph 28 of the complaint, except admits that it did sign the guaranty which appears at page 10 of the agreement between ITTWD and CELSA dated as of July 9, 1969, and respectfully refers to that document for the exact terms thereof.

15. Denies each and every allegation in paragraphs 29 and 31 of the complaint.
16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30 of the complaint.

FIRST DEFENSE

17. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

18. Prior to October 31, 1969 plaintiff received from Arthur Andersen & Co. an audit report of PLT and BERTRAND which raised certain questions regarding BERTRAND's method of depreciating machinery and equipment and the need for BERTRAND to accrue a reserve for certain anticipated future payments to quotaholders, which questions form the basis of plaintiff's First, Second and Fifth Causes of Action herein.

19. The parties to the Agreement of Sale dated as of July 9, 1969, with full knowledge of all relevant facts, resolved and agreed upon the proper disposition of these accounting questions and entered into a substituted agreement with respect to them.

20. On or about October 31, 1969 plaintiff delivered to CELSA, pursuant to and in acknowledgement of said substituted agreement, a check in the amount of \$803,239.

21. Plaintiff further agreed at that time to make an additional payment to CELSA for the salvage value of certain machinery owned by BERTRAND. Said salvage value was subsequently determined to be approximately \$50,000.

22. By reason of the above facts and circumstances, plaintiff's claim against the defendants is barred by the existence of a substituted agreement as to which there has been full performance by the defendants.

THIRD DEFENSE

23. By reason of the above facts and circumstances, there has been a full satisfaction and accord with respect to defendants' obligations to plaintiff under the Agreement of Sale dated as of July 9, 1969.

FOURTH DEFENSE

24. By reason of the above facts and circumstances, plaintiff is estopped from asserting a claim against the defendants with respect to the Agreement of Sale dated as of July 9, 1969.

FIFTH DEFENSE

25. By reason of the above facts and circumstances, plaintiff has waived any claim it might otherwise have asserted against the defendants with respect to the Agreement of Sale dated as of July 9, 1969.

SIXTH DEFENSE

26. By reason of the above facts and circumstances, plaintiff is guilty of laches and is therefore barred from asserting any claim against the defendants based upon the Agreement of Sale dated as of July 9, 1969.

SEVENTH DEFENSE AND SET-OFF
WITH RESPECT TO PLAINTIFF'S
FOURTH CAUSE OF ACTION AGAINST
CELSA

27. On or about July 9, 1969 plaintiff agreed to collect on CELSA's behalf BERTRAND's account receivable from Biafra in the amount of approximately \$25,000, which

account receivable had been fully reserved against as a doubtful account in the balance sheet of BERTRAND as of May 1, 1969.

28. Plaintiff subsequently fully collected said account receivable, but failed and refused to pay over to CELSA the sums collected.

29. In or about June, 1970 the parties to the Agreement of Sale, dated as of July 9, 1969, entered into an agreement pursuant to which CELSA gave up and relinquished its claim against plaintiff for the sum of approximately \$25,000 collected by plaintiff on the Biafra receivable and plaintiff, in consideration therefor, gave up and relinquished its claim against CELSA of \$24,569 for overpayment made in connection with the Agreement of Sale dated as of July 9, 1969.

COUNTERCLAIM

30. Defendant CELSA repeats and realleges the allegations of paragraphs 18 through 21 above.

31. Plaintiff has failed and refused to pay to the defendant CELSA the additional amounts due and owing to CELSA pursuant to the substituted agreement referred to above for the salvage value of certain BERTRAND machinery, although demand for said payment has been made.

32. By reason of the foregoing breach of contract, plaintiff is indebted to CELSA in the sum of \$50,000.

WHEREFORE, defendants respectfully demand:

A. Judgment dismissing the complaint with prejudice;

B. Judgment in the amount of \$25,000
as set-off to plaintiff's Fourth Cause of
Action against CELSA;

C. Judgment in the amount of \$50,000
on CELSA's counterclaim against plaintiff
plus interest from October 31, 1969; and

D. such other and further relief as
the Court may deem just and proper.

Dated: New York, New York
August 30, 1972

BROWN, WOOD, FULLER, CALDWELL & IVEY

By Roger J. Hawke
A Member of the Firm
Attorneys for Defendants
Cia. Editorial de Listas, S.A. and
Editoria de Guias LTB. S.A.
Office & Post Office Address
One Liberty Plaza
New York, New York 10006
(212) 349-7500

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ITT WORLD DIRECTORIES, INC., :
Plaintiff, : 71 Civ. 5496
-against- : R E P L Y
CIA. EDITORIAL de LISTAS, S.A. :
and
EDITORIAL de GUIAS LTB., S.A., :
Defendants. :

Plaintiff, by its attorneys, Cowan,
Liebowitz & Latman, for its Reply to the Counterclaim
contained in the Answer herein:

First: Answering paragraph 18 of the Answer,
admits that prior to October 31, 1969, plaintiff received
from Arthur Andersen Co. a report concerning Publicacoes
de Listas Telefonicas S.A.R.L. ("PLT") and Bertrand
(Irmaos Lda.) ("Bertrand"), respectfully refers to said
report for the contents thereof, and denies each and every
remaining allegation in said paragraph 18.

Second: Answering paragraph 20 of the Answer ad-
mits that on or about October 31, 1969 plaintiff delivered
to defendant Cia. Editorial de Listas, S.A. ("CELSA") a check
in the amount of \$803,239 and denies each and every other
remaining allegation contained in said paragraph 20.

Third: Denies each and every allegation contained
in paragraphs 19, 21, 31 and 32 in said Answer.

FIRST AFFIRMATIVE DEFENSE

Fourth: The Counterclaim fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Fifth: Upon information and belief, the purported agreement alleged in the Counterclaim is barred by the statute of frauds.

W H E R E F O R E , plaintiff demands:

- A. Judgment dismissing the Counterclaim with prejudice;
- B. Relief as requested in the Complaint; and
- C. Such other and further relief as the Court may deem just and proper.

COWAN, LIEBOWITZ & LATMAN

By Alan Latman

a partner
Attorneys for Plaintiff
200 East 42nd Street
New York, N. Y. 10017

(212) 986-6272

STIPULATION OF FACTS

[SAME AS PLAINTIFF'S
TRIAL EXHIBIT 1 -
REPRODUCED IN
EXHIBIT BOOK]

PRE-TRIAL ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ITI WORLD DIRECTORIES, INC., :
Plaintiff, : 71 Civ. 5496
-against- : JMC
CIA. EDITORIAL de LISTAS, S.A. :
and EDITORIA de GUIAS LTD., S.A., :
Defendants. :
-----x

Upon and by reason of the consent of the parties subjoined hereto and pursuant to FRCP 16 and the pertinent rules of this Court, IT IS ORDERED as follows:

1. Federal Court jurisdiction is based on diversity of citizenship and requisite amount in controversy pursuant to 28 USC §1331. There are no objections to jurisdiction.

2. The parties agree that the pleadings as originally filed have been amended as follows:

(a) The Complaint: The Third and Fourth Causes of Action (Pars. 17 through 26) have been withdrawn.

(b) The Answer: The Seventh Defense and Set-Off (Pars. 27, 28 and 29) have been withdrawn.

Aside from the above, there are no amendments to the pleadings.

PRE-TRIAL ORDER

3. Plaintiff intends to call as witnesses at the trial, the following:

- (a) TED B. WESTFALL, 320 Park Avenue, New York, NY
- (b) VICTOR M. BERGER, 320 Park Avenue, New York, NY
- (c) JEREMY JERRAM, Avenue Louise 480 B-1050, Brussels, Belgium
- (d) DR. ADRIANO MOREIRA, Caixa Postal 2350, Lisbon 3, Portugal
- (e) ROBERT S. ARTHUR, Avenida Presidente Wilson 165, Rio de Janeiro, Brazil
- (f) E. CASTANHEIRA, Avenida Presidente Wilson 165, Rio de Janeiro, Brazil

Defendant intends to call as witnesses at the trial, the following:

- (a) ROBERT S. ARTHUR, 4560 Avenida Epitacia, Rio de Janeiro, Brazil
- (b) TED B. WESTFALL, 5 Oakledge Road, Bronxville, New York
- (c) K. WOODROW BENCKERT, ITT World Directories, Inc. 280 Park Avenue, New York, New York
- (d) VICTOR M. BERGER, ITT World Directories, Inc. 280 Park Avenue, New York, New York
- (e) JOHN F. MORRISON, Diners' Club, Columbus Circle New York, New York
- (f) HELEN DONIGIAN, New York City, New York

PRE-TRIAL ORDER

4(a) Plaintiff intends to offer the following exhibits at the trial. (Objections thereto by defendants are noted by an asterisk.)

1. Copy of agreement dated July 9, 1969, which has been identified as Plaintiff's Exhibit "1" for Identification.
2. Statement of July 9, 1969, which has been identified as Plaintiff's Exhibit "2" for Identification.
3. Report of Arthur Andersen & Co. dated August 12, 1969, which has been identified as Plaintiff's Exhibit "3" for Identification.
4. Letter from ITTWD to CELSA dated July 9, 1969, which has been identified as Defendants' Exhibit "F" for Identification.
5. Telex from Berger to Benckert, dated June 13, 1969, which has been identified as Defendants' Exhibit "G" for Identification.
6. Telex from Fernandes to Berger dated June 23, 1969, which has been identified as Defendants' Exhibit "I" for Identification.
7. Escrow Agreement dated July 9, 1969, which has been identified as Defendants' Exhibit "P" for Identification.
8. Telex from Berger to Fernandes dated July 31, 1969, which has been identified as Defendants' Exhibit "Q" for Identification.
9. Telex from Fernandez to Berger dated August 1, 1969, which has been identified as Defendants' Exhibit "R" for Identification.

PRE-TRIAL ORDER

10. Telex from Fernandez to Westfall dated August 1, 1969, which has been identified as Defendants' Exhibit "S" for Identification.
11. Memo dated August 11, 1969 from Arthur Andersen & Co., which has been identified as Defendants' Exhibit "W" for Identification.
12. Letter from Berger to Morgan Guaranty Trust Company dated August 15, 1969, which has been identified as Defendants' Exhibit "X" for Identification.
13. Telex dated September 16, 1969 from Berger to Moreira, Fernandez and Quinn, which has been identified as Defendants' Exhibit "BB" for Identification.
14. Telex dated September 17, 1969 from Moreira, Fernandez and Quinn to Berger, which has been identified as Defendants' Exhibit "CC" for Identification.
15. Report of Arthur Andersen & Co. dated August 12, 1969, which has been identified as Defendants' Exhibit "DD" for Identification (same as Plaintiff's Exhibit "3" for Identification).
16. Memo from Morrison to Berger dated October 23, 1969, which has been identified as Defendants' Exhibit "EE" for Identification.
17. Memo from Morrison to Duma dated October 28, 1969, which has been identified as Defendants' Exhibit "FF" for Identification.
18. Debit and Credit Advice dated October 29, 1969 and request for voucher check dated October 29, 1969, which has been identified as Defendants' Exhibit "GG" for Identification.

PRE-TRIAL ORDER

19. Letter from Johnson to Berger dated October 31, 1969, which has been identified as Defendants' Exhibit "HH" for Identification.
20. Letter from Arthur Andersen & Co. to Scullion dated May 25, 1970, which has been identified as Defendants' Exhibit "JJ" for Identification.*
21. Telex from Hughes to Soto and Jerram dated August 5, 1969, which has been identified as Defendants' Exhibit "RR" for Identification.
22. Copy of Contract of Association of BERTRAND.
23. Copy of Escrow Agreement dated July 9, 1969 among plaintiff, CELSA and Morgan Guaranty Trust Company of New York, relating to the sum of \$900,000.
24. Copy of letter from plaintiff to CELSA dated July 9, 1969, relating to the payment of the sum of \$900,000 as escrow deposit with Morgan Guaranty Trust Company.
25. Copy of letter from plaintiff to Morgan Guaranty Trust Company dated July 9, 1969, relating to the payment of \$4,750,000, pursuant to Escrow Agreement.
26. Copy of letter from plaintiff to TASEC dated July 9, 1969, relating to the payment of \$1,850,000 as consideration for the cancellation of management contracts.
27. Copy of document headed "Cancellation of Management Contracts" dated July 9, 1969, signed by TASEC, CELSA and PLT.
28. Copy of document entitled "Officer's Certificate" dated July 9, 1969, furnished pursuant to Section 4.1 of the Agreement dated July 9, 1969 executed by Eurico M. Castanheira and Robert S. Arthur.

*Defendants object to Plaintiff's Proposed Exhibit 20 on the grounds of lack of relevancy and hearsay.

PRE-TRIAL ORDER

29. Copy of letter dated August 12, 1969 from BERTRAND to Arthur Andersen & Co., Madrid, relating to the examination by Arthur Andersen & Co. of the combined balance sheets of PLT and BERTRAND.

30. Copy of Telex from Berger to Fernandez dated August 4, 1969.

31. Copy of Telex from Soto and Jerram to Peoples or Hughes dated August 5, 1969, which may be the same document identified as Defendants' Exhibit "QQ" for Identification, erroneously referred to as dated August 8, 1969.

4(b) Defendants intend to offer the following exhibits at the trial. (Objections thereto by plaintiff are noted by an asterisk.)

A. AGREEMENT dated July 9, 1969 between plaintiff ITTWD and defendant CELSA and TASEC.

B. Letter dated July 9, 1969 from Robert Arthur to ITT World Directories with enclosures.

C. Combined Balance Sheet of PLT and Bertrand as of May 31, 1969 prepared by Arthur Andersen & Co.

D. Memorandum re phone call from Robert Arthur.*

E. Itinerary of Robert Arthur for portions of 1969.

F. "Calculation of Portugal Purchase Costs" with note and calculations attached.

G. Letter dated August 18, 1969 from Arthur Anderson & Co. to ITT World Directories Board of Directors.

*Plaintiff objects to the introduction of Defendants' Proposed Exhibit D on the grounds of hearsay and lack of foundation.

PRE-TRIAL ORDER

H. Letter dated April 18, 1969 from ITT World Directories (K.W. Benckert) to TASEC.

I. Memorandum dated May 20, 1969 from K.W. Benckert to T.B. Westfall.

J. Letter dated May 23, 1969 from K.W. Benckert to Manuel Soto with balance sheets attached.

K. Letter dated May 28, 1969 from Manuel Soto to K.W. Benckert.

L. Telex dated June 5, 1969 from Benckert to Manuel Soto.

M. Letter dated July 9, 1970 from ITT World Directories (K.W. Benckert) to CELSA.

N. Telex dated June 13, 1969 from V.M. Berger to K.W. Benckert.

O. Telex dated June 25, 1969 from V.M. Berger to Dr. Andriano J. Moreira.

P. Telex dated June 23, 1969 from Fernandez to Victor Berger.

Q. Telex dated June 25, 1969 from T.B. Westfall to Fernandez.

R. Telex dated June 30, 1969 from Fernandez to V.M. Berger.

S. Memorandum dated July 1, 1969 from K.W. Benckert to T.B. Westfall.

T. Memorandum dated July 3, 1969 from T.B. Westfall to H.S. Geneen.

U. Balance sheet of Bertrand as of August 31, 1968 prepared by Arthur Andersen & Co.

PRE-TRIAL ORDER

- V. Memorandum dated July 8, 1969 from K.W. Benckert to C.G. Policastro.
- W. Telex dated July 31, 1969 from Berger to Fernandez.
- X. Telex dated August 1, 1969(?) from Fernandez to V. M. Berger.
- Y. Telex dated August 1, 1969(?) from Fernandez to T.B. Westfall.
- Z. Memorandum dated August 18, 1969 from J.G. Pope to T.B. Westfall.
- AA. Letter dated August 13, 1969 from Arthur Andersen & Co. (Joel A. Hughes) to ITT World Directories (Joseph G. Pope).
- BB. Telex dated August 12, 1969 from Weymouth to Brian Peoples.
- CC. Arthur Andersen & Co. "Memorandum for the Files" dated August 11, 1969 and signed by Joel A. Hughes.
- DD. Letter dated August 15, 1969 from ITT World Directories (Victor M. Berger) to Morgan Guaranty.
- EE. Memorandum dated August 18, 1969 from J.G. Pope to V.M. Berger.
- FF. Letter dated August 18, 1969 from Arthur Andersen & Co. (Joel A. Hughes) to ITT World Directories (Joseph G. Pope).
- GG. Telex dated September 12, 1969 from Scheffer to V. Berger.
- HH. Telex dated September 16, 1969 from Berger to Moreira / Fernandez / Quinn.

PRE-TRIAL ORDER

II. Telex dated September 17, 1969 from Moreira /
Fernandez / Quinn to Berger.

JJ. Memorandum dated October 23, 1969 from J.
Morrison to V. Berger.

KK. Memorandum dated October 28, 1969 from John
Morrison to Michael Duma.

LL. Intercompany Debit and Credit Advice dated
November, 1969 from ITT World Directories to ITT headquarters
with "Request for Voucher Check" attached.

MM. Letter dated October 31, 1969 from Charles J.
Johnson, Jr. to Victor M. Berger, Esq.

NN. Diary entry dated November 5, 1970.

OO. Diary entry dated August 15, 1969.

PP. Diary entry dated September 17, 1969.

QQ. Letter dated May 28, 1970 from Charles J.
Johnson, Jr. to Victor Berger.

RR. ITT World Directories "Appropriation Request"
dated July 8, 1969.

SS. Telex dated September 16, 1969 from Berger /
Morrison to F. Scheffer.

TT. Telex dated August 5, 1969 from J.A. Hughes
to M. Soto / J. Jerram.

UU. Telex from J. Jerram to J.A. Hughes.

PRE-TRIAL ORDER

5. The parties agree that the following issues are to be tried:

A. ISSUES OF FACT

(1) Did Arthur Andersen & Co. deliver to ITTWD and CELSA (i) certified balance sheets of PLT and Bertrand as of May 31, 1969, and (ii) a certificate setting forth the tangible net worth of said companies as of May 31, 1969 as required by Section 3.6 of the acquisition agreement?

(2) If not, did the parties agree to any substituted performance of the aforesaid provision of Section 3.6 of the acquisition agreement?

(3) Did ITTWD and CELSA ever agree on the amount to be paid by ITTWD to CELSA as full payment for the combined tangible net worth of PLT and Bertrand?

(4) Was there a mutual mistake on the part of ITTWD and CELSA with respect to the amount of the final payment required to be made by ITTWD to CELSA?

(5) If not, was there a unilateral mistake on the part of ITTWD with respect to said payment

(6) Did Mr. Arthur and Mr. ~~and Mr.~~

enter into an oral agreement, for the purpose of determining the amount of the final payment due from ITTWD to CELSA, with respect to the disposition of the exceptions which Arthur Andersen & Co. took in its August 12, 1969 report on the combined balance sheets of PLT and Bertrand?

B. ISSUES OF LAW

- (1) Is defendants' defense of accord and satisfaction valid?
- (2) Is defendants' defense of waiver valid?
- (3) Is defendants' defense of estoppel valid?
- (4) Is defendants' defense of laches valid?
- (5) Is defendants' counterclaim barred by the Statute of Frauds?

6. The parties disagree on certain other issues These are as follows:

A. ISSUES OF FACT

- (1) Plaintiff's Statement: Did ITTWD agree that it would make a further payment to CELSA for the salvage value of certain machinery of Bertrand? If so, to what extent and under what conditions.

PRE-TRIAL ORDER

Defendants' Statement: Did ITTWD agree that the payment of \$803,239 to CELSA represented only a "partial payment" and that ITTWD would make a further payment to CELSA for the salvage value of certain machinery of Bertrand?

B. ISSUES OF LAW

(1) Plaintiffs Statement: If the payment of \$803,239.00 made by ITTWD to CELSA on October 31, 1969 was the result of a unilateral mistake on the part of ITTWD to the extent of \$353,997, can ITTWD recover from CELSA in this action the sum of \$353,997.00 even though CELSA did not view the amount of such payment as a mistake?

Defendants' Statement: If the payment of \$803,239 made by ITTWD to CELSA on October 31, 1969 was the result of a unilateral mistake on the part of ITTWD to the extent of \$353,997.00, but was the correct amount as far as CELSA was concerned, can ITTWD recover from CELSA in this action the sum of \$353,997?

(2) Plaintiffs Statement: Does the Statute of Frauds* bar defendants from asserting an oral substituted agreement and that both parties thereafter fully performed in accordance

*The parties agree that the term "Statute of Frauds" covers any statutory provisions dealing with the subject matter traditionally referred to by that term.

PRE-TRIAL ORDER

with said substituted agreement.

Defendants' Statement: Does the Statute of Frauds bar defendants from asserting that the parties orally agreed to performance of the contract of July 9, 1969 in a manner different from that provided for in said contract, and that both parties thereafter substantially performed in accordance with said substituted agreement?

s/ John M Cannells
U. S. D. J.

Dated: New York, New York
November 5, 1973

WE CONSENT TO THE ENTRY OF THE
FOREGOING PRE-TRIAL ORDER:

COWAN, LIEBOWITZ & LATMAN, P.C.

BY: s/ Alan Latman
A Member of the Firm
Attorneys for Plaintiff

BROWN, WOOD, FULLER, CALDWELL & IVEY

BY: s/ Roger J. Hawke
A Member of the Firm
Attorneys for Defendants

TRIAL TRANSCRIPT

1 JWFM

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X
5 ITT WORLD DIRECTORIES, INC., :
6 Plaintiff, :
7 vs. : 71 Civil 5496
8 CIA EDITORIAL DE LISTAS, S.A. and :
9 EDITORIAL DE GUIAS LTD., S.A., :
10 Defendants. :
11 -----X
12 Before:
13 HON. JOHN M. CANNELLA,
14 District Judge
15 February 13, 1974
16 APPEARANCES

17 COWAN, LIEBOWITZ & LATMAN, ESQS.
18 Attorneys for Plaintiff,
19 BY: ALAN LATMAN ESQ., and
20 MARVIN S. COWAN, ESQ.,
21 of Counsel.

22 BROWN, WOOD, FULLER, CALDWELL & IVEY, ESQ.,
23 Attorneys for Defendants,
24 BY: ROGER J. HAWKE, ESQ.,
25 of Counsel.

2 THE CLERK: ITT World Directories, Inc. against
3 CIA Editorial and another. Is the plaintiff ready?

4 MR. LATMAN: The plaintiff is ready.

5 THE CLERK: Is the defendant ready?

6 MR. HAWKE: The defendant is ready.

7 THE COURT: Is there anything to be gained by
8 compromise, or have you exhausted all your remedies along those
9 lines?

10 I think you compromised two phases of this,
11 didn't you, or some of them?

12 MR. HAWKE: Yes, your Honor.

13 THE COURT: That means you cannot compromise this
14 phase, is that it?

15 MR. HAWKE: It appears that way, your Honor.

16 THE COURT: All right.

17 Mr. Latman; you can open.

18 MR. LATMAN: Your Honor, my name is Alan Latman
19 and I would like very much to make a brief opening.

20 This action seeks restitution of approximately
21 \$353,000, which plaintiff claims was an overpayment in an
22 acquisition transaction. Your Honor has had some contact
23 with this action in the past in the sense of having ruled on
24 the pension situation and, that the attachment of the
25 defendant's funds was valid.

2 The case turns on a surprisingly narrow issue of
3 fact, your Honor, this notwithstanding the fact that we are
4 dealing with \$353,000, not a small sum, we are dealing with
5 parties who are substantial business operations, operating
6 on an international scale and the fact that we are dealing
7 originally with a fairly complex acquisition involving some
8 eight million dollars and reams of paperwork by attorneys.
9 But basically we think that the case comes down to a single
10 narrow issue and that is, did the plaintiff make a mistake in
11 calculating the amount due defendants, or did the parties
12 scrap their printed agreement and agree in one brief
13 conversation to an oral agreement which the defendants called
14 a substituted agreement.

15 The plaintiff claims it made a mistake and is
16 entitled to restitution. The defendants claim that in this
17 one conversation, an officer of the plaintiff, without check-
18 ing with anyone, without any notes, without any written
19 confirmation, agreed to forget about some \$350,000.

20 Now, the acquisition involved the purchase by
21 plaintiff from the defendant CIA Editorial de Listas, S.A.,
22 which, your Honor, we have come to call "CELSA", C-E-L-S-A,
23 of its interest in a Portuguese telephone company, Telephone
24 Directory Company, called P.L.T., and a Portuguese printing
25 company interest, the print company being called "Bertrand,"

2 B-E-R-T-R-A-N-D.

3 The overpayment in question was the result of a
4 payment after the closing. The closing took place on July 9,
5 1969. And there was to be, among other things, a payment to
6 be calculated on the net worth of the two acquired companies.
7 The parties agreed that the net worth in this respect would
8 be as determined by the international accounting firm of
9 Arthur Andersen and Company, which happened to be the
10 independent auditor for both companies.

11 The alleged oral substituted agreement says, in
12 effect, as we understand it, let's forget about Arthur
13 Andersen and Company, let's forget what its opinion of net
14 worth is; according to the defendants, the plaintiff agreed
15 to simply take the defendants' figures on what the net worth
16 was. In other words, the impartial arbiter was out the window
17 and the defendants' claim, in effect, be reasonable, do it our
18 way and take the defendants' figures. That is really the
19 essence, I think, of the dispute.

20 Now, Arthur Andersen had --

21 THE COURT: Does the Statute of Frauds apply?

22 MR. LATMAN: We think it does, your Honor. In
23 our trial memorandum we detail that.

24 THE COURT: I will be very frank to tell you
25 because of the present business I have had, I have not been

2 able to read either brief, so you can assume I know nothing
3 about this case at this point.

4 MR. LATMAN: All right, your Honor. We think
5 aside from legal infirmities that the defendants have,
6 including the Statute of Fraud, that they will not be able to
7 prove this alleged oral agreement.

8 Now, the auditors, Arthur Andersen, took the
9 defendants' report and they took their figures that this
10 defendant gave as net worth and they found that in two
11 respects it was inaccurate. They found that two deductions
12 should have been made by way of exceptions to the company's
13 figures.

14 The first exception dealt with a depreciation
15 fund. Arthur Andersen found that the company's reserve, the
16 depreciation was too small, that it should have been larger
17 and, of course, if it were larger that would have represented
18 a deduction from the net worth figure that the defendant put
19 out.

20 Secondly, the company Bertrand -- there was a
21 peculiarity of Portuguese law called the Quota Company which
22 seems to be kind of a hybrid, your Honor, between some kind of
23 corporate entity and the limited partnership and the like. I
24 don't think it has a parallel in this country. But at any rate
25 the Bertrand family had originally sold the majority interest

2 to CELSA but they still retained a small minority interest and
3 there were certain payments under the Articles of Association
4 and under Portuguese law that had to be paid to these people
5 in the future. They are called quota holders, so that Arthur
6 Andersen also felt that there was no reserve against the
7 obligation of the company to make these payments in the future
8 to the Bertrand family. So that was a second ground on which
9 Arthur Andersen found that the net worth figure put out by
10 the defendant was inaccurate.

11 Now, the mistake, your Honor, came, when the plain-
12 tiff went to make this post closing payment they failed to
13 use the Arthur Andersen figures with the two deductions that
14 I mentioned and instead made the payment based on what the
15 defendant had said the net worth was and Arthur Andersen had
16 disagreed with.

17 Most of the facts, or many of the facts in this
18 action have been stipulated and, your Honor, I will offer into
19 evidence in a moment the stipulation which your Honor so
20 ordered. I think it does clear away a lot of debris.

21 And also it affords a lot of background that both
22 sides need to argue the case before your Honor.

23 The plaintiff will show really at least three
24 basic items which we think alone entitle the plaintiff to
25 relief. First, as I have indicated, that the agreement which

1: jwrm

2: was not only written, your Honor, it was printed, the agree-
3: ment provided that the independent auditor Arthur Andersen
4: should do the determination of net worth. There is no
5: controversy, I think on that fact that I just stated.

6: Secondly, there is no controversy on this, either:
7: Arthur Andersen found the pertinent figures, the net worth
8: figures, to be three million Portuguese escudos units there.
9: An escudo is worth about three and a half cents, your Honor.
10: I don't think there is any dispute that Arthur Andersen
11: calculated the net worth to be approximately three million
12: escudos.

13: And, thirdly, there is no dispute of the fact that
14: the plaintiff made payment to the defendant on the basis of
15: some fourteen million escudos. The eleven million escudo
16: difference, the overpayment, your Honor, is the amount in
17: question here. It comes to \$353,997 and it is the amount of
18: this overpayment that the plaintiff seeks and asks your Honor
19: to award.

20: MR. HAWKE: If it pleases the Court, my name is
21: Roger Hawke and I am appearing here on behalf of the defendant
22: CELSA. Your Honor, the defendants here submit that the notion
23: that ITT, which had a large, sophisticated corporation, made
24: a mistake when it paid defendants 492,000 some-odd dollars
25: for CELSA's interest in the net worth of PLT, a notion that

2 that payment was a mistake and that we paid \$353,000 too much
3 we think is just utterly without merit and borders on the
4 absurd. We think the evidence is going to show in this case
5 that the payment which was made was in accordance with the
6 intent and agreement of the parties; that the plaintiff itself
7 calculated that payment and it was put in evidence, the
8 plaintiff's own calculations of that payment, it calculated
9 the amount correctly, it knew what it was doing, it knew the
10 proper amount and it paid the proper amount. And indeed, the
11 evidence is going to show that, not only was there no under-
12 payment made by the plaintiff, but that in fact the plaintiff
13 acknowledged that it owed additional money, that the payment
14 that it was making was only a partial payment, and that it
15 owed an additional sum which was estimated at some \$50,000.
16 Plaintiff itself has acknowledged that in documents which
17 we will offer in evidence. We think this claim of mistake was a
18 recent contrivance which claim came to light two days before
19 an escrow fund was going to be released. That was the first
20 time this was asserted against the defendant. That was on
21 July 7, 1971; a year and a half or so after payment was made,
22 two days before an escrow account was going to be released,
23 all of a sudden we find that an assertion, you know, the
24 payment we made back in 1969, well, that was a mistake. We
25 think the claim is utterly without merit. And the evidence is

2 going to show we think that it was a very curious kind of
3 mistake that was made. It was a mistake that no one in
4 plaintiff's behalf will admit to. We will be interested to
5 hear from the testimony they are going to offer just who made
6 this mistake.

7 We think not only is the claim far-fetched as a
8 matter of fact, we think it is insufficient as a matter of
9 law, as we point out in our trial memorandum. Even if the
10 plaintiff could establish this proposition that in their mind
11 they were only obligated to pay a certain amount and that they
12 made an overpayment, even if they could establish that, and
13 as we said, they can't, all they would have succeeded in
14 doing is showing a unilateral mistake. They would show no
15 mistake on the part of the defendant. As far as the
16 defendant was concerned, from the very outset we got what we
17 were entitled to.

18 THE COURT: It does not have to be a mistake. It
19 can be knowledge. It can be coercion, it can be direct.
20 There could be a lot of other elements involved that were not
21 mistakes.

22 MR. HAWKE: It was not under duress or fraud or
23 anything else, but simply a mistake on their part.

24 THE COURT: Without any knowledge on your part?

25 MR. HAWKE: I don't know what they contend our

1 jwrm

10

2 knowledge was, but we will prove what our knowledge was, that
3 as far as we were concerned, this was the correct amount and
4 at the very best, all they can show was a unilateral mistake
5 and as a matter of law it is insufficient. There is no reason
6 why this contract should be reformed to conform to what they
7 think we are entitled to and to leave us without what we think
8 we are entitled to. I say as a matter of law it was
9 insufficient. The question raised here as to the Statute of
10 Frauds we think is a red herring and has nothing to do with
11 this case. We point out in our trial memorandum, we are
12 certainly entitled to prove that what happened in this case
13 was not a mistake. The Statute of Frauds doesn't apply.
14 Even if it did apply, all the Statute of Frauds would say,
15 there is a memorandum signed by the plaintiff acknowledging
16 such an obligation. There is such a memorandum from their
17 own comptroller's department showing the amount they paid. So
18 the Statute of Frauds I think we can set aside. It has
19 nothing to do with it.

20 Now, the evidence is going to show, your Honor,
21 that this contract, acquisition agreement, was entered into
22 in July of 1969 -- July 9th. Before that contract was even
23 entered into, the plaintiff here was fully aware of the
24 situation concerning these quota holders and the obligation
25 of Bertrand to make certain payments, advances on profits to

2. these quota holders. They knew all about it. They knew about
3. it before the contract was entered into. There was no provi-
4. sion in the contract which attempted to saddle the burden on
5. the defendants of providing for these payments in the future
6. after ITT acquired the covenant. That was not something that
7. was agreed upon. The plaintiff is trying to work that in the
8. back door through the claim of net worth.

9. Now, the contract provided in very clear language
10. that Arthur Andersen and Company was going to prepare and
11. deliver to the parties two things -- and it is stipulated in
12. our stipulation of facts just what those two things were --
13. they were going to deliver, one, certified balance sheets of
14. the company as of May 31, 1969 and, two, a certificate
15. setting forth the tangible net worth of the companies as of
16. May 31, '69.

17. The obligation which was going to be incurred by
18. the plaintiff was to make the payment to the defendant of the
19. amount as set forth in the certificate, the second document,
20. the certificate setting forth the tangible net worth, they
21. were going to make a payment of that net worth to the defend-
22. ant and this was going to occur some months after the closing,
23. the post closing payments after the financial statements were
24. available.

25. Now, there was a proviso, however, which the

1: jwrm

12

2: plaintiff here conveniently ignores. The proviso was that if
3: the defendant disagreed with anything stated in that certifi-
4: cate of net worth, that it could dispute it and if the parties
5: could not resolve this dispute, that the matter would be
6: submitted to an arbitrator mutually selected. This is a part
7: of the contract which the plaintiff conveniently sweeps under
8: the rug in this case. They take the position that the obli-
9: gation was to pay whatever Arthur Andersen's opinion was and
10: that was it. And they say on that basis, anything they paid
11: over that amount had to be a mistake, because there was no
12: recourse. That was not the case. The fact is the contract
13: provided we could arbitrate disputes if we were unable to
14: resolve them.

15: The evidence will show that Arthur Andersen, in
16: the course of its audit, did take two exceptions to the com-
17: pany's balance sheets as Mr. Latman said. It took one
18: exception with respect to the reserve or depreciation of
19: machinery. It thought that reserve should have been increased.
20: And it took another exception with respect to the failure of
21: the company to set up on its books a reserve in the amount of
22: six million escudos to provide for future payments to these
23: minority quota holders for the rest of their lives in an
24: amount which would satisfy the obligation to pay the minimum
25: advance on profit.

44a

1 jwrm

13

2 Now, the evidence will be very clear that the
3 defendant did not agree with these exceptions of Arthur
4 Andersen and it is for the very reason that they did not agree
5 that Arthur Andersen took exceptions to the company's balance
6 sheets. If there had been agreement that this was correct,
7 the company would have looked at these amounts and there would
8 have been no exceptions noted on the balance sheets. The
9 very fact there was an exception shows there was a disagree-
10 ment.

11 Now, the company CELSA did not arbitrate this
12 dispute. Why didn't it arbitrate the dispute? Because it
13 came to an agreement as the contract provided for with respect
14 to the proper disposition of these amounts.

15 Now, the evidence will show that Arthur Andersen
16 and Company delivered the balance sheet which contained its
17 report. At no time did Arthur Andersen send the second item
18 that was called for in the contract, which was a certificate
19 setting forth the tangible net worth of the company. At
20 least, it never made or delivered any such certificate to the
21 defendant CELSA. And, of course, their only obligation was
22 to pay what was set forth in any such certificate.

23 There was no such certificate delivered, but the
24 parties concluded the transaction, the final payments were
25 made on the basis of what had been delivered and on the basis

of the company's figures that are contained in the report.

I think it is perfectly clear in this case, and it will be demonstrated that had Arthur Andersen delivered in accordance with the contract a certificate stating that, in their opinion the tangible net worth of the company was \$138,000 instead of \$492,000, had that been delivered and had plaintiff tendered that amount in fulfillment of its obligation, there is no, absolutely no question that the arbitration provisions would have been invoked and the matter would have been resolved by arbitration and we wouldn't be here today. But, as I say, Arthur Andersen delivered no such certificate, the defendant did not invoke its right to arbitrate. We did not do so because there was an agreement on the correct amount. Payment was made in accordance with that correct amount that was mutually agreed upon.

Now, as I stated, the evidence will demonstrate that on October 31, 1969 plaintiff made or delivered a check to defendants' attorneys in the amount of some \$803,000 which comprised two elements. One part of that check represented an additional payment called for under the contract having to do with the value of the Dafundo plan, the Bertrand Dafundo plan in Portugal. The parties agreed the excess of the appraised value over the book value minus certain tax deductions would be paid by the plaintiff to the defendant. That

2. was part of the \$303,000. The other part represented the
3. 492,000 some-odd dollars which we contend was the correct amount
4. owed for the net worth of these two companies. That check
5. was delivered. Before it was delivered ITT's own auditing
6. department, at the instructions of their general counsel, had
7. prepared a sheet summarizing these calculations. The sheet
8. has been sent back to the counsel to be reviewed and a check
9. has been issued accordingly. We say that ITT's own sheet of
10. calculations was correct.

11. Now, at the time the check was delivered, a
12. receipt was tendered which acknowledged the receipt and said,
13. "We also point out in substance that this payment is only a
14. partial payment of the amount here." That was not disputed
15. because part of the discussion that had been entered into was
16. that an additional amount was to be paid over and above what
17. was registered on the company's books for the salvage or
18. residual value of certain machinery which was held by
19. Bertrand. That document is in writing.

20. Now, plaintiff's case is going to rest in part, I
21. think, upon some interesting interpretation of the English
22. language. They are going to say, I believe, that it is true
23. that the contract called for two things and it is spelled out
24. in the stipulation one and two, a balance sheet and a
25. certificate of net worth, and it is also true, they will say,

1 jwrm

16

2 that the company, Arthur Andersen delivered only one thing
3 which was the brown cover report, but they say, well, since
4 no certificate was delivered we will just invent one and what
5 we'll do is we'll say that this brown cover report, that is
6 the certificate, and whereas the contract called for two
7 separate documents, they will say one is enough and that will
8 do for the purposes of this case. And that is how they come
9 to the conclusion that they paid more than was required in
10 the certificate of net worth.

11 Now, the evidence will show, your Honor, on this
12 issue of mistake that in February of 1970 plaintiff, on its
13 own initiative, did a recalculation of the amount that was
14 paid under the purchase agreement, and they sent this
15 recalculation down to the offices of the defendant's attorney.
16 That was a step-by-step recalculation of what the contract
17 required was to be the final payment. That was forwarded to
18 the defendant's attorney by the attorney for ITTWD. This
19 recalculation demonstrated that there had, in fact, been an
20 error -- it is an error which I hasten to add is no longer in
21 dispute in this case -- the parties in making this final
22 payment had made an assumption that CELSA owned one hundred
23 percent of Bertrand when, in fact, it only had owned 92.1
24 percent of Bertrand. CELSA did own one hundred percent of the
25 old company referred to as P.L.T. That mistake amounted to

2: \$24,000. It was acknowledged in the matter of the settlement.
3: At no time in February 1970 when they were making this
4: recalculation of the amounts owed was it ever suggested that
5: not only did they make a 24,000 mistake out of this \$492,000,
6: they made a \$353,000 mistake. As a matter of fact, when the
7: attorney for ITTWD sent this calculation down, he said -- and
8: it is a memorandum which will be introduced -- that when the
9: salvage values are worked out, perhaps we can work it out
10: acknowledging that not only was the amount correct, but an
11: additional amount was due and forthcoming by ITTWD. This
12: is on their own memorandum.

13: Let me step back a minute. At the time of the
14: closing in July 1969, \$900,000 had been set up in an escrow
15: fund. The contract provided that 450,000 of that would be
16: released one year after the closings, July 9, 1970. The
17: second half would be released July 9, 1971.

18: When July 9, 1970 rolled around, no claim was
19: made by the plaintiff that any mistake had been made. They
20: released the full amount that was due to be released at the
21: time, \$450,000.

22: When the second half of the escrow was to be
23: released, as I mentioned before, July 9, 1971, some year and
24: a half after the payment was made, then for the first time do
25: they come to us and say, "Look, we made a mistake."

2 Insofar as the Arthur Andersen report is con-
3 cerned, I would like to point out it is stipulated here that
4 this report was in the hands of both parties for a period of
5 almost two months prior to the final payment. Not only was
6 it in the parties' hands, but it was read and considered and
7 we will show and it is stipulated that there were certain
8 telexes which went back and forth, inter-office telexes of
9 plaintiff which brought attention to the Arthur Andersen
10 report and to this question of payments to quota holders.
11 These telexes were dated September 12th, 16th and 17th dis-
12 cussing the very matter which was in controversy between Arthur
13 Andersen and CELSA, and then on September 17th the evidence
14 will show right at the time that this matter is actively being
15 considered by ITTWD, it is stipulated there was a meeting and
16 we contend it was a meeting between ITT and CELSA and the
17 matter was discussed and resolved. Plaintiffs evidently
18 have no recollection of any such discussions right on the
19 heels of their own telexes which discuss this subject.

20 We submit, your Honor, in short, the claim that
21 there was any mistake in overpayment here is simply spurious,
22 that there was no mistake. If there was a mistake, it is
23 certainly not defendant's mistake, and if plaintiff made the
24 mistake, it is entitled to no relief as a matter of law and,
25 as a matter fact, we think the evidence in this case will show

1 jwrm

2 the plaintiff in this case owes the defendant at least
3 \$150,000.

4 MR. LATMAN: Your Honor, plaintiff would like to
5 offer into evidence Plaintiff's Exhibit 1 for identification
6 which is a stipulation of fact which your Honor so ordered on
7 November 5, 1973.

8 MR. HAWKE: That is agreed to, your Honor.
9 (Plaintiff's Exhibit 1 for identification
10 received in evidence.)

11 MR. LATMAN: It might be helpful, your Honor, if
12 I read just a few of the provisions here made to the Court.

13 Paragraph 1: "On July 9, 1969, ITT World
14 Directories, referred to as ITTWD, and CIA Editorial de Listas,
15 S.A. referred to as CELSA, and Tasec-Technical Advertising
16 and Sales Engineering Corporation referred to as TASEC,
17 entered into an agreement, hereinafter an acquisition agree-
18 ment, whereby ITTWD agreed to purchase and CELSA agreed to
19 sell CELSA's wholly owned subsidiary, P.L.T. - Publicacoes de
20 Listas Telefonicas, S.A.R.L. ("PLT"), and CELSA's 92.1%
21 interest in Bertrand."

22 Paragraph 11: "On July 9, 1969, ITTWD, CELSA and
23 TASEC entered into the acquisition agreement (Plaintiff's
24 Deposition Exhibit 1). That agreement provided in relevant
25 part as follows:

2 "(d) ITTWD agreed to cause Arthur Andersen &
3 Co. (or its affiliate) to audit the accounts of PLT and
4 Bertrand as of May 31, 1969, and as soon as practicable after
5 the closing of the contract to deliver to ITTWD and CELSA:

6 "(i) 'certified balance sheets of said
7 companies as of May 31, 1969,' and

8 "(ii) 'a certificate setting forth the
9 tangible net worth of said companies as of May 31, 1969,'
10 computed in accordance with the formula set out therein
11 (\$3.6).

12 "(e) It was further agreed that as soon as
13 practicable after receipt by ITTWD of 'said certificate'
14 setting forth the tangible net worth' of PLT and Bertrand
15 as of May 31, 1969, the following payments would be made:

16 "(i) If at May 31, 1969 the tangible net
17 worth of PLT 'as set forth in said certificate' was positive,
18 ITTWD would pay to CELSA an amount equal to such tangible
19 net worth. If said net worth reflected a deficit, CELSA
20 would repay to ITTWD an amount equal to said deficit.

21 "(ii) If at May 31, 1969 the tangible net
22 worth of Bertrand 'as set forth in said certificate' was
23 positive, ITTWD would pay CELSA an amount equal to 92.1% of
24 such tangible net worth. If said net worth reflected a
25 deficit, CELSA would repay to ITTWD an amount equal to 92.1%

1. jwrn
2. of such deficit."

3. Your Honor, in accordance with the pretrial order,
4. plaintiff offers into evidence Plaintiff's Exhibit 2 for
5. identification which is the acquisition agreement of July 9,
6. 1969.

7. MR. HAWKE: No objection.

xx 8. (Plaintiff's Exhibit 2 for identification
9. received in evidence.)

10. MR. LATMAN: And in accordance further with the
11. pretrial order, Paragraph 4(a)(3) thereof, plaintiff offers
12. into evidence the report of Arthur Andersen and Company dated
13. August 12, 1969.

14. MR. HAWKE: No objection.

xx 15. (Plaintiff's Exhibit 3 for identification
16. received in evidence.)

17. MR. LATMAN: Plaintiff calls as its witness
18. Jeremy Jerram.

19. J E R E M Y J A M E S J E R R A M , called as a
20. witness by the plaintiff, having first been duly sworn,
21. testified as follows:

22. DIRECT EXAMINATION

23. BY MR. LATMAN:

24. Q What is your residence, Mr. Jerram?

25. A Avenue de La Closiere, 43 Waterloo, Belgium.

1 JWRM

Jerram-direct

22

2 Q What is your nationality?

3 A British.

4 Q And what is your profession?

5 A Chartered accountant.

6 Q Are you familiar with the status of certified
7 public accountants in the United States?

8 A Yes.

9 Q What is the relationship between a chartered
10 accountant in Britain and a CPA?

11 A They are approximately equivalent.

12 Q In the year 1969, what was your professional
13 affiliation?14 A I was an auditing manager in the Madrid office of
15 Arthur Andersen and Company.

16 Q What is an auditing manager?

17 A He's a man who is responsible for the conduct and
18 administration of a number of audit engagements on behalf of
19 his firm in the services of the clients of that firm.20 Q Did you have occasion in the spring and summer of
21 1969 to participate in an engagement of Arthur Andersen and
22 Company involving an audit of the accounts of a company known
23 as PLT, and a company known as Bertrand as of May 31, 1969?

24 A Yes.

25 Q What was your role in connection with that

2 engagement?

3 A That engagement was assigned to me as the auditing
4 manager. I was responsible for insuring that the audit was
5 completed and that the report responsive to that engagement
6 was issued.

7 Q Are you presently employed by Arthur Andersen and
8 Company?

9 A No..

10 Q When did you leave their employ?

11 A In July of 1971.

12 Q When did you finish the work on the PLT and
13 Bertrand audit?

14 A In September of 1969.

15 Q And where did you become employed after you left
16 Arthur Andersen?

17 A With ITT SemiConductors Division in Portugal.

18 Q Are you still employed by that company?

19 A I am still employed by ITT now in Brussels.

20 Q Excuse me?

21 A Now in Brussels.

22 Q Up until the time of your work on the PLT and
23 Bertrand audit, what was your training and experience in the
24 accounting field?

25 A From 1960 until 1963 I received a degree in

2 History and Economics at the University of Cambridge, England
3 and from 1963 until 1966 I took a contract of articles with
4 the London office of Arthur Andersen and Company resulting in
5 my qualification as a chartered accountant in the summer of
6 1966.

7 Q Is a charter of articles equivalent to some kind
8 of apprenticeship to become a chartered accountant?

9 A Yes..

10 Q What exactly, Mr. Jerram, was the nature of the
11 engagement of Arthur Andersen with respect to the books of
12 PLT and Bertrand as of May 31, 1969?

13 A Arthur Andersen's Madrid office was requested to
14 do sufficient work in order to enable it to issue an opinion
15 on the net worth of those two companies as of May 31, 1969.

16 Q Did Arthur Andersen fulfill that engagement?

17 A Yes..

18 Q Did it express that opinion?

19 A Yes..

20 Q I show you Plaintiff's Exhibit 3 and ask you to
21 please tell his Honor what that is.

22 A I'm sorry, I am not sure whether you mean what
23 the opinion is or what the exhibit is.

24 Q What the exhibit is.

25 A The exhibit is Arthur Andersen's opinion together

1 JWRM Jerram-direct 25

2 with the financial statements of those two companies.

3 THE COURT: As of May 31st?

4 THE WITNESS: As of May 31st.

5 Q Does Plaintiff's Exhibit 3 contain the opinion
6 that you just referred to?

7 A Yes.

8 Q Please tell the Court where that opinion is con-
9 tained in the exhibit.

10 A That opinion is contained on the first two pages.

11 Q In the early stages of your engagement, did you
12 have a discussion with anyone at Arthur Andersen as to how
13 you would proceed to fulfill the engagement?

14 A Yes.

15 MR. HAWKE: I object to this, your Honor.

16 THE COURT: Just yes or no. He did answer it yes.

17 Q With whom did you have that discussion?

18 A With a more experienced auditing manager, Mr.
19 Soto, and with one of the audit partners, Mr. Waymut.

20 Q Both of those gentlemen being at Arthur Andersen;
21 is that correct?

22 A Yes.

23 Q What was the substance of that discussion?

24 MR. HAWKE: Objection, your Honor.

25 THE COURT: Sustained.

2 Q As a result of your consideration of the matter
3 and/or any discussion you had, did you determine as audit
4 manager on this job how to proceed to fulfill the engagement?

5 A Yes.

6 Q And what did you determine in that respect?

7 MR. HAWKE: I object to this, your Honor.

8 THE COURT: It seems to me that this is merged
9 in the material which was furnished. Under the circumstances,
10 it would be inadmissible unless you have some exception I am
11 not aware of at this time.

12 MR. LATMAN: Well, in particular I wanted Mr.
13 Jerram to describe the procedure that he followed and the end
14 products that he contemplated and identify the fact that this
15 exhibit is that end product.

16 THE COURT: It seems to me that that would be more
17 cross examination, but you are, in effect -- I am not aware
18 at this time that there is no dispute as to this document.
19 In the openings it seems to me that both of you adopted this
20 document, in effect, so that I do not know what point you
21 are driving at here. If there was some area here which you
22 could point out to me that the defendants say is not so, then
23 I will say yes, let's find out how he arrived at it. But
24 both of you agree this is the report and that as far as the
25 report is concerned, there is nothing the matter with it.

2. MR. LATMAN: I suppose that's right, but the
3. significance of this document in the case is already argued,
4. I suppose, by counsel I thought suggested collaboration, but --

5. THE COURT: Well, in the absence of a dispute
6. between the parties as to any particular areas of this report,
7. I see nothing to be gained by listening now to --

8. MR. LATMAN: Very well, your Honor.

9. Q Mr. Jerram, when you referred to net worth earlier,
10. was that net worth concept defined in any agreement?

11. A Yes.

12. Q I show you Plaintiff's Exhibit 2 and ask you
13. whether that is the agreement in which the net worth which
14. you were to determine was defined.

15. A Yes, it is.

16. Q And what was the net worth that was so defined as
17. determined by Arthur Andersen and Company?

18. MR. HAWKE: Objection, your Honor. The documents
19. are in evidence.

20. THE COURT: They speak for themselves. Sustained.
21. But maybe to assist the Court, if you have another document
22. there some place -- have you got the document?

23. THE WITNESS: Yes, I have this document.

24. THE COURT: Can you point out in the document
25. where the net worth appears?

2 THE WITNESS: Yes.

3 THE COURT: I will read as much as I can, but he
4 has better eyes.

5 THE WITNESS: On the fourth page of the document--

6 THE COURT: Which page?

7 THE WITNESS: The fourth, the penultimate number
8 in the right-hand column shows 14062780 escudos. That was
9 the net worth as represented by the management of the two
10 companies.

11 The opinion of Arthur Andersen contained on the
12 first two pages indicates that this was first overstated by
13 five million escudos. That overstatement is explained in the
14 second paragraph of the opinion.

15 Secondly, it was overstated by six million escudos
16 as explained in the third paragraph of the opinion.

17 And thirdly may have been either under or over-
18 stated for the effect of any collections on the Biafra
19 receivables.

20 Q What is the net result of those adjustments in
21 the opinion of Arthur Andersen?

22 MR. HAWKE: Again, this document is in evidence.
23 Objection.

24 THE COURT: It is, but it makes it easier to
25 follow. I will overrule the objection.

2. Where does it appear so I can find it.

3. THE WITNESS: I'm sorry, the number which you seek
4. does not appear as such. To take you through, the net worth
5. after those steps would be escudos 3,062,780 plus the effect
6. of any collections on the Biafra receivables which was not
7. determinable at the time of the report.

8. Q In order to aid the Court in that calculation, is
9. that taking that approximately fourteen million escudo figure
10. which you found on page 4 and deducting the five million and
11. six million to which you referred making the deduction of
12. eleven million and a net worth, a remainder of three million?

13. A Yes.

14. Q In your opinion, as an accountant, does that
15. represent that approximately three million escudo figure the
16. tangible net worth of these two companies as of that date as
17. defined in the agreement?

18. MR. HAWKE: Objection, your Honor. This witness
19. is not here as an expert.

20. THE COURT: I do not know which one you are
21. objecting on. Do you object that he cannot give an opinion
22. because it has not been shown that he is expert in this area?

23. MR. HAWKE: My objection is his opinion is
24. irrelevant. He is not an expert witness. His opinion is
25. irrelevant and the document in evidence speaks for itself.

1 JWRM

Jerram-direct

30

2 I don't think we need this witness' opinion on what it shows.

3 THE COURT: We will take it. You do dispute his
4 qualifications to give his opinion?

5 MR. HAWKE: Yes.

6 THE COURT: All right, examine him on the voir
7 dire. He has shown that he is a Cambridge candidate, and
8 that he is a certified public accountant in effect, using the
9 equivalent here. You can develop his qualifications further
10 if you desire to do that.

11 MR. HAWKE: Your Honor, I won't pursue the matter
12 of his qualifications. I would simply say nothing in the
13 pretrial order states this witness is called as an expert
14 witness. He is primarily a fact witness.

15 THE COURT: I find at this time that he is
16 qualified and on the question of opinion I will rule further,
17 but in view of the fact that there is surprise, I will allow
18 you any opportunity you want to produce any expert you want
19 which will contradict any opinion of this witness. So the
20 only remedy you really have is surprise at this point.

21 MR. LATMAN: Your Honor, I am not sure whether
22 the answer was recorded.

23 THE COURT: There is no answer to be recorded yet.
24 We are still arguing whether or not he should be allowed to
25 answer. I have not ruled on the second phase of it.

1 JWRM

Jerram-direct

31

2 On the second phase of it, I sustain the objection.
3 I find him to be an expert, but I find at this time not that
4 his opinion is irrelevant, but if you are going to put this
5 in, you should have put it in the pretrial order. It is not
6 unfair in the sense of like hitting below the belt, but I
7 think it is unfair if you think it over, you would have told
8 the other side which is going to be the area in dispute. I
9 am sure they are not prepared to bring any expert to
10 contradict what he may say about this.

11 MR. LATMAN: They certainly did know Mr. Jerram
12 was to be called as a witness.

13 THE COURT: You are calling him out of his
14 habitat. In other words, what particularly is unfair now
15 is this: Since this time he has now joined ITT.

16 MR. LATMAN: Correct, your Honor.

17 THE COURT: So it might be said, well, that might
18 be weighed in order to weigh his testimony that he is now an
19 employee of the defendant. But this seems to me to be
20 cumulative in effect. You already have an opinion that says
21 these are the figures. He is going to say, "Me, too." How
22 big a voice is "me" too from an employee who is working for you
23 and who was originally working as a certified public account-
24 ant? I am going to sustain the objection.

25 BY MR. LATMAN:

63a

2 Q Mr. Jerram, would you explain to the Court the
3 basis for the computation of the five million escudo depreci-
4 ation item?

5 A Yes.

6 Q Please do.

7 A I refer to the company Bertrand. This company
8 had acquired items of plant and machinery over a long period
9 of years, and in some of those years, generally speaking prior
10 to 1964, had not recorded depreciation in accordance with
11 generally accepted accounting principles on those specific
12 items.

13 During the course of the Arthur Andersen audit,
14 the employees of the company were requested to prepare a
15 detailed listing of all of the items of plant and machinery
16 and were also requested to compute how much depreciation would
17 have been recorded had these items been depreciated over their
18 useful life from the date of acquisition. This calculation,
19 after adjustment for expected salvage values, gave rise to the
20 conclusion on the part of Arthur Andersen that the depreci-
21 ation reserve was understated by five million escudos and
22 that, therefore, the net worth was overstated by the same
23 amount.

24 Q Would you please describe to the Court the basis
25 for the six million escudo figure on the advance quota holder

1: JWIM

Jerram-direct

33

2: deductions?

3: A Yes.

4: Q Please do.

5: A Under the articles of association of Bertrand,
6: certain of the quota holders who together owned, I believe,
7: 7.9% of the quotas, were entitled to annual payments on
8: account of future profit. These payments began in, I believe,
9: 1966 and at the date of the audit, that is to say, May 31,
10: '69, they cumulatively had exceeded the profits attributable
11: to those quota holders. This gave rise to a receivable of
12: approximately one and a half million escudos at that date.

13: In discussions with the management of Bertrand,
14: we learned that these amounts were probably uncollectible --

15: MR. HAWKE: That is objected to as hearsay, your
16: Honor.

17: MR. LATMAN: Your Honor, the Bertrand principles,
18: if we can clarify, would include the defendant.

19: THE COURT: But it is still hearsay.

20: MR. LATMAN: It is an admission by the defendant,
21: your Honor, in other words, an out-of-court statement by the
22: defendant to Mr. Jerram which I think is an exception.

23: THE COURT: If he can clarify them better than he
24: has. At this point he is talking about some people.

25: Q Did you have discussions with Mr. Robert Arthur in

65a

1 jwrn

Jerram-direct

34

2 this connection?

3 A Yes.

4 Q Is he one of the individuals you just had reference
5 to?

6 A Yes.

7 MR. LATMAN: Your Honor, Mr. Arthur, I believe, is
8 the principal representative of the defendant in this
9 transaction?

10 MR. HAWKE: I have no objection, of course, to
11 his testifying about conversations with Mr. Arthur. If he is
12 going to testify to conversations with others after the date
13 of July 9, 1969, which is after the acquired this company,
14 that is different.

15 THE COURT: We will take it at this point.

16 Q Would you continue in reference to Mr. Arthur in
17 connection with the Bertrand and CELSA deal.

18 A Yes. Accordingly, Mr. Arthur agreed that the
19 receivables from these quota holders should be regarded as
20 uncollectible and, therefore, should be deducted from net
21 worth as of May 31, 1969.

22 Q That covers the situation prior to May 31, 1969.
23 Did Mr. Arthur agree to any reserve for a similar situation
24 after May 31, 1969?

25 A No. Mr. Arthur agreed that as the payments would

2 continue on exactly the same basis after May 31, 1969, the
3 company Bertrand had a continuing obligation to make these
4 payments. However, Mr. Arthur's position on this was that
5 these payments would effectively be funded from the future
6 profits of the company.

7 Q Did Mr. Arthur give you any backup on that view
8 which enabled you to agree with him or disagree with him?

9 MR. HAWKE: I have to object to the leading
10 nature of the questions, your Honor.

11 THE COURT: I think it is leading, but there is
12 no jury here and in an area like this, it might be very hard
13 to ask a question which would elicit an answer. But I will
14 sustain it as to form.

15 Q What was your response to this view as expressed
16 by Mr. Arthur?

17 A My response was that Mr. Arthur's view would be
18 allowable if there were substantive evidence of likely future
19 profitability.

20 Q Did you find any such substantive evidence?

21 MR. HAWKE: Objection. It is a vague answer that
22 is taken as evidence. I don't think it is acceptable. It is
23 hearsay.

24 MR. LATMAN: It is not hearsay.

25 MR. HAWKE: It requires comments from others and

2 investigations.

3 THE COURT: No, it requires something on his part
4 to look at the record and find out in his opinion whether
5 there was the likelihood of profits in the future. I will
6 allow it since at that time he was working as an employee of
7 Andersen and represented Andersen's view.

8 MR. LATMAN: Will you read the question, please.

9 (Question read.)

10 A No..

11 Q Mr. Jerram, you testified as to Mr. Arthur's
12 agreement to a certain write-off as to the quota holder
13 question prior to May 31, 1969. Did Mr. Arthur, on behalf of
14 CELSA, agree to any of the other requests or positions of
15 Arthur Andersen?

16 A Yes..

17 Q What was that?

18 A There were a considerable number of other adjust-
19 ments to the financial statements of Bertrand to which he
20 agreed and which were reflected in the accounts of that
21 company.

22 Q Did he furnish Arthur Andersen with any represen-
23 tations requested by Arthur Andersen?

24 A Yes..

25 Q I show you Plaintiff's Exhibit 4 for identification

2 and ask you whether this represents such a representation from
3 CELSA to Arthur Andersen?

4 A Yes.

5 MR. LATMAN: Your Honor, plaintiff offers into
6 evidence Plaintiff's Exhibit 4 for identification.

7 MR. HAWKE: No objection.

xx 8 (Plaintiff's Exhibit 4 for identification

9 received in evidence.)

10 Q Did Mr. Arthur agree to any write-off with
11 reference to the depreciation?

12 A No.

13 Q Did the company at any time make such a write-off?

14 MR. HAWKE: Objection. At what time are we
15 talking about? After ITT took over?

16 THE COURT: Rephrase your question so the time
17 is more definite.

18 MR. LATMAN: Well, I am referring, your Honor, to
19 any time after the summer of '69.

20 MR. HAWKE: But after ITT took over is not
21 probative against us, your Honor.

22 MR. LATMAN: Your Honor, Mr. Hawke, in his open-
23 ing, made three or four references to certain things ITT
24 plaintiff did or did not do in 1970. He began talking about
25 what we said as I recall in February 1970. He talked about

2 something else we did in July 1970, in order to cast light
3 on what the facts were back at those dates.

4 THE COURT: In view of the fact -- I do not want
5 to keep this witness here, I will take it at this time
6 because I think they might produce him in rebuttal in the
7 light of some of the things you did say did happen.

8 MR. HAWKE: What I did talk about were communica-
9 tions between ITT and the defendant. I certainly did not talk
10 about what ITT was doing on their own books unkown to us.

11 THE COURT: Not unknown to you, but some of the
12 known things they were doing with respect to you, like the
13 releasing of the escrow of the 450 --

14 MR. HAWKE: Their discussions and communications
15 with us I have no objection to.

16 THE COURT: I will take it subject to connection
17 and a motion to strike if it is not.

18 Read the question, please.

19 (Question read.)

20 A Yes.

21 Q When?

22 A In December of 1969.

23 Q What was the amount of that write-off?

24 A Five million escudos.

25 Q And at that time were you engaged in representing

2 Arthur Andersen in auditing the books of plaintiff?

3 A Yes.

4 Q Mr. Jerram, it has been stipulated that the actual
5 payment made by plaintiff on account of the taxable net worth
6 of Bertrand and PLT as of May 31, 1969 was approximately
7 fourteen million escudos. When, if ever, did you learn of
8 that fact?

9 A I believe this was late in 1970.

10 Q And do you recall where you were when you
11 discovered it?

12 A Yes.

13 Q Where?

14 A I had a meeting with Mr. Berger in, I believe,
15 November of 1970 at which he drew this to my attention.

16 THE COURT: Who is Mr. Berger?

17 MR. LATMAN: Yes, I was going to ask.

18 Your Honor, Mr. Berger is the gentleman sitting
19 at counsel table next to Mr. Cowan who was an officer and
20 general counsel of the plaintiff in connection with this
21 transaction.

22 His name is Victor M. Berger.

23 Q Did you communicate anything to Mr. Berger at that
24 time in terms of the payment as you understood it according
25 to the Arthur Andersen report?

2. MR. HAWKE: Objection, your Honor. I object on
3. several grounds.

4. THE COURT: I will just take yes or no, but I will
5. stop it there.

6. A Yes.

7. THE COURT: Well, make your record.

8. MR. LATMAN: I will.

9. THE COURT: You are allowed to make your record.

10. MR. LATMAN: Right, your Honor.

11. Q What did you say, Mr. Jerram?

12. MR. HAWKE: Objection.

13. THE COURT: Sustained.

14. MR. LATMAN: Excuse me a moment.

15. THE COURT: Suppose we take a five-minute recess.

16. MR. LATMAN: Fine. Thank you.

17. (Recess)

18. MR. LATMAN: Your Honor, I have no further
19. questions of Mr. Jerram at this time.

20. THE COURT: All right.

21. CROSS EXAMINATION

22. BY MR. HAWKE:

23. Q Mr. Jerram, when did you first become involved in
24. doing any auditing work for Bertrand, or auditing for the
25. company Bertrand?

- 1 JWRM Jerram-cross 41
- 2 A Approximately May 26th or 27th, 1969.
- 3 Q Arthur Andersen had done a prior audit of the
4 accounts of Bertrand as of August 31, 1968, had it not?
- 5 A Yes.
- 6 Q Did you work on that audit?
- 7 A No.
- 8 Q You were familiar with that audit because at the
9 time you commenced work on the May 31, 1969, audit; is that
10 right?
- 11 A Yes.
- 12 Q And you read and reviewed it, hadn't you?
- 13 A Yes.
- 14 Q I would like to show you what has been marked as
15 Defendant's Exhibit A and ask you if this is a copy of the
16 August 31, 1968 audit of Arthur Andersen and Company of the
17 account of Bertrand?
- 18 A Yes, it is.
- 19 Q Do you know who signed that on behalf of Arthur
20 Andersen and Company?
- 21 A I don't, but I could surmise.
- 22 Q Well, what is your best knowledge?
- 23 A My surmise is that this was signed by a partner
24 of Arthur Andersen called Paul Marquart.
- 25 Q When was that audit completed, do you know?

2 A The date of the audit is reported as October 1968.

3 MR. HAWKE: I offer Defendant's Exhibit A for
4 identification in evidence.

5 MR. LATMAN: No objection.

xx 6 (Defendant's Exhibit A for identification
7 received in evidence.)

8 Q Did Arthur Andersen, in this audit as of August
9 31, 1968, take any exceptions for failure of the company to
10 set up a reserve for payments to quota holders?

11 A No.

12 Q Did it disagree with the company's figures with
13 respect to the depreciation of machinery as shown in the
14 company's books?

15 MR. LATMAN: I object to the form of the question
16 in terms of "disagree," your Honor.

17 MR. HAWKE: Let me withdraw the question.

18 Q Did it take any exception with respect to the
19 account for depreciation of machinery?

20 A No.

21 Q Would you tell the Court what exceptions, if any,
22 Arthur Andersen did take with respect to the accounts of
23 Bertrand as of August 31, 1968?

24 A Arthur Andersen took an exception first to the
25 consistency and application of accounting principles.

2 Q It took exception. What did it say?

3 A It said, "In accordance with your instructions" --
4 and I read from the second paragraph of the exhibit -- "we
5 did not extend our auditing procedures sufficiently to enable
6 us to express an opinion on the consistency of the application
7 of accounting principles in the accompanying balance sheet as
8 of August 31, '68 with those applied in the balance sheet as
9 of December 31, '67."

10 Q So Arthur Andersen was not passing judgment on
11 the question of whether or not the accounts of August 31,
12 1968 were consistent with the method of -- with the accounts
13 as of December 31, 1967; is that right?

14 A That is correct.

15 Q Did Arthur Andersen determine that the company's
16 financial statement as of August 31, 1968 fairly reflected
17 the financial position of Bertrand with certain exceptions?

18 A I'm sorry, could you repeat the question.

19 MR. HAWKE: Let me withdraw the question.

20 Q Would you read the statement of the opinion that
21 Arthur Andersen gave on the August 31, 1968 balance sheet?

22 A Yes.

23 Q That opinion is the last paragraph; is that right?

24 A That's right.

25 Q Okay.

2 A "In our opinion, except for the effects, if any,
3 of, A, such adjustments as might have been disclosed had
4 confirmation been obtained of the receivables referred to in
5 the preceding paragraph" -- that means the Biafra receivables
6 -- "and B, possible losses which may be sustained in the
7 collection of that receivable, the accompanying balance sheet
8 presents fairly the financial position of Bertrand as of
9 August 31, 1968 in conformity with generally accepted
10 principles."

11 THE COURT: Now the question is if the exceptions
12 were important in 1969, why weren't they important in 1968?

13 THE WITNESS: That is --

14 THE COURT: Do not answer that, all right.

15 THE WITNESS: Okay. Yes, I can try to answer it
16 if you wish.

17 THE COURT: All right, go ahead.

18 THE WITNESS: But in a sense that would be a
19 proper question to ask Arthur Andersen.

20 Q Well, do you know the answer?

21 A I believe I know some of the answers.

22 MR. HAWKE: Well, I would just as soon have someone
23 with knowledge instead of speculation.

24 THE COURT. Then I will do the speculating. Let
25 me do it as a juror.

2 Q Would you answer the question.

3 A Yes. In respect of the depreciation which was the
4 first of the two exceptions we discussed on the May '69 audit,
5 there had been considerable discussion in the course of the
6 '68 audit and there had also been a change in circumstances
7 between August '68 and May '69.

8 Q What changes in circumstances was that?

9 A Firstly, there was a calculation made on a fairly
10 rough basis by the employees of Bertrand during the course
11 of the '68 audit which indicated that there was probably a
12 depreciation shortfall. However, at that time there did not
13 exist detailed reports supporting the plant and machinery
14 account which would have enabled a proper calculation to be
15 prepared such as was prepared in May of 1969.

16 In addition, during the course of the May '69
17 audit, we became aware of substantial commitments for new
18 machinery of which we were not aware during -- of which Arthur
19 Andersen was not aware during the 1968 audit. These substan-
20 tial commitments for new machinery meant that, in accordance
21 with, I think normal business practice, the existing machinery
22 and equipment therefore would normally have a shorter service
23 life -- a shorter remaining service life.

24 Q The equipment and machinery which was the subject
25 of the opinion in the 1969 audit was machinery and equipment

2. acquired in 1960 and prior, wasn't it?

3. A Acquired in 1964 and prior, I believe. The
4. depreciation had not been -- yes, the major items were
5. acquired prior to 1960.

6. Q Well, the statement in Exhibit 3 says this "under-
7. statement relates primarily to machinery and equipment
8. acquired in 1960 and prior." Is that right?

9. A Yes, I'm sorry. The acquisition was '60 and prior,
10. the depreciation was '64 and prior.

11. Q So the depreciation reserve on the company's books
12. in August 31, 1968 also related to that equipment which was
13. acquired in 1960 and prior; is that right?

14. A Yes.

15. Q And in 1968 Arthur Andersen and Company took an
16. exception to the method of depreciation of that equipment; is
17. that right?

18. A That's right.

19. Q And it said that the financial statement of the
20. company's statement of that account fairly presented the
21. financial condition of the company as of August 31, 1968.
22. Isn't that right?

23. A That is almost right, yes.

24. Q Well, did Arthur Andersen and Company ever withdraw
25. its certificate on the August 31, 1968 balance sheet?

2 A No, I'm sorry. I used the expression "almost,"
3 because it is a convention in public accounting that you
4 express an opinion on the financial statement taken as a
5 whole, not on the individual account.

6 Q All right. With that explanation, Arthur Andersen
7 and Company found that the company's figures fairly represented
8 the financial condition of the company as of August 31, 1968,
9 with the exception of items A and B which you read from the
10 opinions, right?

11 A Yes.

12 Q And did Arthur Andersen and Company ever inform
13 Bertrand that it was withdrawing any opinion it gave on the
14 earlier financial statement?

15 A I believe not.

16 Q Now, in August of 19 --

17 THE COURT: Just a minute. There was another
18 exception. What was the other one, the quota?

19 MR. HAWKE: Yes, I was just going to get to that,
20 your Honor.

21 THE COURT: All right, go ahead.

22 Q In connection with the August 31, 1968 financial
23 statements Arthur Andersen had available to it the Articles of
24 Association of Bertrand, did it not?

25 A I believe so.

2. Q And it knew all about the payments that had been
3. made to the quota holders, didn't it?

4. A I believe so.

5. Q And it took no exception to the company's excep-
6. tion to set up a reserve to provide for the payments to the
7. rest at large, did it?

8. A I'm sorry, I understand your question, but I
9. wasn't sure, by putting the --

10. MR. HAWKE: All right, let me withdraw the
11. question.

12. Q Did the company in August of 1968 have on its
13. books a reserve to provide for the payment of these advances
14. of profits to the quota holders for the rest of the lives of
15. these quota holders?

16. A No.

17. Q It had no such reserves on its books, did it?

18. A That is correct.

19. Q And Arthur Andersen took no exception to the
20. failure of Bertrand to provide such a reserve on its books?

21. A That is correct.

22. Q And did Arthur Andersen and Company ever communi-
23. cate to Bertrand and state that it was in error in any way in
24. its certification given with respect to the August 31, 1968
25. financial statement?

2. A I don't know.

3. Q To the best of your knowledge, it didn't; is that
4. right?

5. MR. LATMAN: I object.

6. THE COURT: Yes. It is speculation.

7. Q You have no personal knowledge about any such
8. communications?

9. MR. LATMAN: I object to the form.

10. THE COURT: That is a different question now.
11. Does he know of his own knowledge whether or not and he can
12. answer that.

13. A I know of no such communication.

14. THE COURT: Do you know from your work with these
15. books how many of these quotas there were, persons involved
16. in this quota thing?

17. THE WITNESS: Yes.

18. THE COURT: How many, approximately?

19. THE WITNESS: The people who had the rights to
20. these payments were five.

21. THE COURT: Five. And I suppose that would have
22. to require you, in order to make a judgment as to a reserve
23. that would be required for this, to look into their life
24. expectancy.

25. THE WITNESS: Yes.

2 THE COURT: And that was done?

3 THE WITNESS: That was done.

4 THE COURT: All right.

5 Q In connection with the reserve that was set up,
6 or that Arthur Andersen stated in its report should be set up
7 with respect to the payments to quota holders, did you make
8 a determination that the company was not going to be profit-
9 able and, therefore, would not earn enough money to make
10 these advances on profits to quota holders?

11 A No.

12 Q Well, if you thought the company was going to
13 earn this money, would you have required a reserve to be set
14 up?

15 MR. LATMAN: I object to the form of that question.

16 MR. HAWKE: He can answer it. I am trying to find
17 out the basis for the reserve.

18 THE COURT: He apparently made that judgment
19 because the report speaks for itself. They did state there
20 should be a reserve and, therefore, he must have come to the
21 conclusion or whoever made the judgment in this case came to
22 the conclusion because of their life expectancy --

23 MR. HAWKE: I think your Honor allowed that
24 question as to profits. And you answered that no.

25 THE WITNESS: That's right.

2 Q And because you thought there was no likelihood
3 of profits to be applied to the reserve; is that right?

4 A May I phrase the answer somewhat differently?

5 THE COURT: I do not understand it myself. Why
6 set up a reserve for something that is not going to exist.
7 If there were no profits, there would be no need for reserve.
8 He would only set up a reserve if there were anticipated
9 profits and their life expectancy was such that you multiply
10 it by each year.

11 MR. HAWKE: Maybe the witness can answer.

12 THE COURT: Maybe I misunderstand. Can you
13 elucidate?

14 THE WITNESS: Yes, the Articles of Association
15 provided these amounts would be paid on account of future
16 profits, but the Articles made no provision for the situation
17 in which profits were not sufficient to fund these payments.
18 So what had happened historically was that the company had
19 gone along in each month, had written out a check to each of
20 these people and posted it off to their private addresses,
21 and at the end of each year the profits attributable to
22 these individuals as their share of the earnings of the
23 corporation had not been sufficient to offset these payments.

24 THE COURT: It seems to me then, what you are
25 saying is, even if there were no profits, they were getting

2 money.

3 THE WITNESS: That's right. They were --

4 THE COURT: If they lived up to the letter of the
5 law of the agreement, there would be no need for a reserve in
6 years when there were no profits?

7 THE WITNESS: Yes, if the company didn't pay them.

8 THE COURT: By course of conduct, they had
9 acquired a habit of paying these fellows whether they earned
10 the profits or not as I understand it.11 THE WITNESS: That's right, and also the Articles
12 of Association did use the form of words "on account of
13 future profit" without ever defining the term.14 THE COURT: Therefore, they would anticipate
15 profits even in the year when there were no profits.

16 THE WITNESS: We believe so.

17 MR. HAWKE: I am a little confused.

18 Q Let me see if I am correct, Mr. Jerram. Was it
19 your opinion that the reserve should be set up because you
20 anticipated that the company was not going to earn the
21 profits, but that it would have to make the payments anyway?

22 A May I answer that question slightly differently?

23 Q Yes.

24 A Yes. Arthur Andersen's opinion was that a reserve
25 would be required in the event that there were payments to

2 these people for the remainder of their lives and there were
3 not sufficient profits to fund them.

4 Q If the company was going to earn the profits,
5 these minimum payments would simply be just a distribution of
6 those profits and no reserve would be required; is that
7 right?

8 A That is correct.

9 Q So it was Arthur Andersen's judgment that the
10 company was not going to be profitable, that it required this
11 reserve to be set up?

12 A Once again, you use a form of word which is
13 slightly stronger than the one we would have used. I think
14 it was Arthur Andersen's judgment that there was no substanti-
15 tive evidence of probable future profitability.

16 Q How far in the future did Arthur Andersen make
17 this judgment, for the lives of these quota holders?

18 A I'm sorry, I don't understand.

19 MR. HAWKE: All right, let me withdraw the
20 question.

21 Q Did you have to calculate the life expectancy of
22 the individuals to whom these payments were being made?

23 A Yes.

24 Q And do you know what those life expectancies were?

25 A Approximately from memory, but in my briefcase

2 I have a piece of paper where they are written on.

3 Q What is your recollection of what these life
4 expectancies were?

5 A The three of them were elderly people and they
6 had life expectancies of six to ten years. Two of them were
7 younger people and had life expectancies of let's say thirty
8 years.

9 Q Thirty years?

10 A Yes.

11 Q And the reserve that Arthur Andersen set up or
12 recommended be set up was a reserve to provide for the pay-
13 ments of these advances on profits to these individuals for
14 the rest of their lives; is that correct?

15 A That is correct.

16 Q Is it correct then that with respect to the
17 individual who had a life expectancy of thirty years, that it
18 was Arthur Andersen's judgment that Bertrand would not be
19 profitable for another thirty years?

20 A No, I don't think that is the case.

21 Q But it nevertheless required that a reserve be
22 set up to require the payments of profits for thirty years,
23 didn't it?

24 A Yes.

25 Q But it was not their opinion that the company

2 would be profitable for that length of time, right?

3 A Could I clarify one thing for you?

4 Q Yes.

5 A First of all, there was a future stream of payments
6 to be made to these individuals and naturally these were in
7 computing the reserve requirements, these were discounted at a
8 rate of interest which approximated the long time borrowing
9 interest in Portugal at that time which was four percent.

10 Q The obligation to make the payment over the course
11 of years was discounted to present value?

12 A That's right.

13 Q But nevertheless it was based on the expectation
14 of the needs to make these payments --

15 A For the remainder of the life.

16 Q And in the case of this one individual with thirty
17 year life expectancy, that was the estimate, right, thirty
18 years?

19 A That's right, yes.

20 THE COURT: These are the very matters that would
21 have arisen in the arbitration had the arbitration been held.

22 MR. HAWKE: Precisely, your Honor.

23 THE COURT: I hope we do not go into that here,
24 because I am not an arbiter unfortunately. I do not belong to
25 the arbiter society. I invited this by asking the initial

2 question. I admit I am contributorily negligent.

3 You see, all this discussion is almost irrelevant
4 because the fact of the matter is, was there a mistake and
5 that doesn't make any difference whether the report was good,
6 bad or indifferent and if the mistake is made because of the
7 report, the report does not have to justify itself, because
8 the state of mind of the plaintiff here is a unilateral mis-
9 take, and if he was mistaken that is the point. It may be
10 that the report was very good. It may be it was very bad.
11 But that is almost immaterial.

12 MR. HAWKE: I think these do go to whether or not
13 there was any mistake when this final payment was made, your
14 Honor. I think it bears on that question.

15 Q The fact is Mr. Arthur disagreed with you on the
16 need to set up such a reserve, hadn't he?

17 A Yes.

18 Q And if he had agreed, there would be no need to
19 take exception to the balance sheets; is that right?

20 A That is correct.

21 Q By the way, when a company has a 99-year lease,
22 does Arthur Andersen recommend it set up lease payments for
23 these 99 years?

24 MR. LATMAN: I object.

25 THE COURT: Sustained.

2 Q Did Mr. Arthur tell you why he had not agreed to
3 book this reserve of six million escudos for payments to quota
4 holders?

5 A Yes.

6 Q What did he tell you?

7 A My recollection of my discussion with Mr. Arthur
8 is that during that discussion, he told me that in his opinion
9 the future profits of Bertrand would be sufficient that 7.9%
10 of them would fund these payments.

11 Q Did you have any estimate at hand as to whether or
12 not Bertrand would be profitable in the year 1969?

13 A No.

14 Q I would like to show you what has been marked
15 Defendant's Exhibit B for identification which is 00 on the
16 deposition, and ask you whether or not you were aware that
17 ITT itself had projected profits for Bertrand in the year
18 1969?

19 A I was not so aware.

20 MR. HAWKE: I offer Exhibit B in evidence.

21 (Pause)

22 Q If you had known ITT had projected profits in 1969,
23 would you have required a reserve be set up for payments to
24 these quota holders for the balance of their lives?

25 MR. LATMAN: I object.

2 THE COURT: I assume he speaks for Andersen when
3 he speaks of this point and the rational of the Andersen
4 organization is to take things into consideration like this,
5 then I will allow it.

6 MR. LATMAN: There are a couple of problems. One
7 is the speculative nature of this. And the other is Mr.
8 Hawke is basing it on the document we just discussed and I
9 would like him to look over it.

10 THE COURT: I will take it subject to connection
11 until when the document is received. Read the question to
12 him, please.

13 (Question read.)

14 A I don't know.

15 THE COURT: Let me analyze that as a juror so I
16 can find out as a juror, not as a judge, what your answer
17 means.

18 As I understand this, ITT looks at a company
19 which is not part of their company yet and which they know
20 nothing about except what they are told and have been able to
21 find out themselves, and they somehow then project the figures
22 and say, "We think they are going to make money next year."
23 Now, as an accountant, would you take that? Or would you
24 feel you would like to go to the company and find out what
25 makes the company tick and make your opinion from their books

2 rather than what ITT's conclusion was?

3 THE WITNESS: Let me try and think back to being
4 a member of Arthur Andersen. I think what you would do in
5 that circumstance is to take the projection made by ITT, or
6 by whomsoever, and you would give them weight in determining
7 what stance you would take. They won't, merely by their
8 existence, be wholly persuasive.

9 THE COURT: But you would consider them, they
10 would have some weight?

11 THE WITNESS: Yes, you certainly wouldn't throw
12 them out of the window.

13 THE COURT: All right.

14 BY MR. HAWKE:

15 Q Mr. Jerram, is it correct that two of these quota
16 holders had been receiving no advances on profits as of May
17 31, 1969? Is that correct?

18 A That's right.

19 Q That was Manuel and Carlos Bertrand?

20 A That's right.

21 Q And nevertheless Arthur Andersen included them
22 when they set up a reserve for payment of quota holders?

23 A That's right.

24 Q They would only reserve these advances on profits
25 in the events they were discharged, is that right, or retired?

2. A I believe so, yes.

3. Q And that discharge or retirement as of July 9,
4. 1969 would have occurred only by ITT, not CELSA company,
5. right?

6. MR. LATMAN: I object to that.

7. THE COURT: I think the contract and the evidence
8. speaks for itself. I assume if ITT takes control of the
9. company, they are not going to listen to what CELSA wants
10. them to do, or a couple of employees.

11. Q When you set up the reserve, you charged it to the
12. net worth of the company as of May 31, 1969, I assume, to
13. make payments to Carlos and Manuel Bertrand when those pay-
14. ments were not even being made at that time.

15. A That's right.

16. Q And they were not being made unless ITT in the
17. future did something to make these payments come into effect,
18. namely by firing them or discharging them; is that right?

19. A That's right, but not wholly right because both
20. Manuel and Carlos were, of course, employees of Bertrand and,
21. therefore, were receiving other payments as employees. I am
22. sure you will have read the Articles of Association of
23. Bertrand which provides for these payments and indicates only
24. if they cease to become employees does the right for them to
25. receive the quota payments begin.

2 Q But these payments set up were only with respect
3 to the advancement of profits to quota holders?

4 A That is correct.

5 Q Did you see the engagement letter that was sent
6 by ITTWD to Arthur Andersen with respect to the May 31, 1969
7 audit?

8 A I don't remember.

9 Q I show you what has been marked Defendant's
10 Exhibit C -- it is also deposition Exhibit C for identifica-
11 tion -- and ask you if you ever saw that engagement letter
12 from Benckert to Mr. Soto?

13 A I believe I did see this letter.

14 MR. HAWKE: I offer Defendant's Exhibit C in
15 evidence.

16 MR. LATMAN: No objection, your Honor.

xx 17 (Defendant's Exhibit C for identification
18 received in evidence.)

19 Q You notice in the third paragraph of that letter,
20 which is dated May 23, 1969, Arthur Andersen is requested to
21 perform an audit of the balance sheet as of December 31, 1968
22 and estimate of income for the year 1968. This is for the
23 Bertrand company. Do you see that?

24 A Yes.

25 Q That date was subsequently changed, was it not, to

2 May 31, 1969; is that right?

3 A Yes.

4 Q Now, --

5 MR. LATMAN: Excuse me. I don't think the witness
6 finished.

7 A No, I believe the entire arrangement in this
8 letter was changed.

9 Q When was that?

10 A I don't remember, but let me clarify it for you.
11 I believe that in the course of this engagement, there were a
12 series of discussions as to what would be the scope and the
13 method of discharging it; and that the scope of the work and
14 the form of the report to be decided -- to be issued by Madrid
15 to Arthur Andersen differed materially from what is contained
16 in this letter.

17 Q Do you have anything in writing which would show
18 how that engagement was changed?

19 A No.

20 Q Did you receive any other letter from ITT other
21 than Exhibit C?

22 A I don't remember.

23 Q Well, look at the last paragraph on the first page
24 of that exhibit. It says, "Additionally you will furnish us
25 with a separate statement of the net worth of Bertrand as of

1 jwrm

Jerram-cross

63

2 December 31, 1969 and as of the closing date all terms in
3 accordance with the above definition."

4 Did you receive any instructions from Mr.
5 Benckert or anyone from ITT not to furnish that separate
6 statement of the net worth of Bertrand?

7 A Let me try and be as clear as I can, but I would
8 like you to understand that I am partly in the realm of
9 surmise.

10 Q No, I am just asking you for your knowledge of
11 any instructions from Mr. Benckert or anyone from ITT with
12 respect to that request to furnish a separate statement of
13 the net worth of December 31, 1968.

14 A I have no direct knowledge.

15 Q Let me show you what has been marked Exhibit D
16 for identification. Did you receive this telex from Mr.
17 Hughes in August of 1969?

18 A I have no recollection. I am sure we had.

19 Q And "E", did you send that to Mr. Hughes?

20 A I believe yes.

21 MR. HAWKE: I offer D and E for identification
22 in evidence.

23 MR. LATMAN: No objection, your Honor.

xx 24 (Defendant's Exhibits D and E for identification
25 received in evidence.)

2 Q Is it correct that before the escrow fund of
3 \$4,750,000. could be released, Arthur Andersen was to deliver
4 a certificate to the parties stating whether or not there was
5 a negative or positive net worth of Bertrand and PLT?

6 A I am not sure. I believe so.

7 Q You are not sure?

8 A I am not sure. I don't believe I ever read the
9 escrow agreement.

10 Q Looking at two exhibits which have been marked in
11 front of you, does that refresh your recollection as to
12 whether or not a certificate was going to be issued by Arthur
13 Andersen and Company?

14 MR. LATMAN: Your Honor, I believe he testified
15 he doesn't recall.

16 THE COURT: He wants to know whether this
17 refreshes his recollection. If it does, well and good. If
18 it does not, he will have to stand by his previous answer.

19 A I am sorry, would you repeat the question.

20 (Question read.)

21 A Not materially. If I read the words, I would say
22 yes, but I don't recollect.

23 Q Well, in your telex to Mr. Hughes, there is a
24 statement, second sentence, "If net worth is negative we
25 should issue certificate as required by agreement."

2. You have no recollection of this subject of
3. issuing a certificate coming up in August, 1969?

4. A I don't want to appear unhelpful, but that para-
5. graph to which you refer begins, "Agree with your telex of
6. August 5."

7. Q Yes.

8. A Which I don't see you have given me. That's
9. right, that is this one.

10. Q That is the other exhibit.

11. A That is the other exhibit and that says, "Before
12. I discuss your telex," so I assume what you have given me
13. here is two parts of a series and I am not sure I can usefully
14. remember the subject matter.

15. Q Let me show you what has been marked Exhibit F
16. for identification and ask you if that is the first telex
17. in the series.

18. A I believe so, yes. That is to say, I believe that
19. is the first in the series.

20. MR. HAWKE: I offer F for identification in
21. evidence.

22. MR. LATMAN: Your Honor, if we can reserve our
23. objection on this.

24. THE COURT: You are basing it on whether or not it
25. was entered in the pretrial order. That, to me, leaves me

2 completely cold because my only remedy is to find out whether
3 there is anything else you can develop in this area by way of
4 surprise.

5 MR. LATMAN: No, your Honor. I just want to read
6 it.

7 THE COURT: All right then.

8 MR. HAWKE: This was a telex from the witness
9 turned over to us by the plaintiff, your Honor.

10 MR. LATMAN: We have no objection.

xx 11 (Defendant's Exhibit F for identification
12 received in evidence.)

13 Q You have the series of telexes. Are you able to
14 state whether or not you have a recollection as to whether
15 Arthur Andersen and Company was to deliver a certificate
16 stating tangible net worth in August 1969?

17 A Yes, I now have a recollection.

18 Q I show you what has been marked G for identifica-
19 tion and I ask you if this is the certificate which was
20 delivered at that time to ITTWD?

21 A I want to be clear here. I don't know that that
22 is what was required, but on the other hand, it must have
23 been.

24 Q Do you know who signed this?

25 A I see that it is date-lined at the New York office.

2 Q Do you know whose signature is there besides
3 Arthur Andersen?

4 A I don't know, but I could surmise, too. Let's
5 say that opinion must have been prepared on the basis of
6 evidence provided to us by Portugal.

7 MR. HAWKE: I offer Defendant's Exhibit G in
8 evidence.

9 MR. LATMAN: No objection.

xx 10 (Defendant's Exhibit G for identification
11 received in evidence.)

12 Q The report that Arthur Andersen delivered, which
13 is Exhibit 3 in evidence here, dated August 12, 1969, you will
14 see it has been stipulated in this indicating that it was not
15 finally prepared and delivered until sometime in September,
16 1969. Does that accord with your recollection?

17 A Yes.

18 Q And I think you stated that this report, that you
19 considered the statements made on pages 1 and 2, and if you
20 take into account footnote 10 on 7, 8 and 9 -- if you
21 considered that footnote and the subject matter discussed on
22 pages 1 and 2, if you put all that together it would turn out
23 that Arthur Andersen's opinion was that Bertrand and PLT
24 had combined positive net worth of approximately \$130,000;
25 is that right?

2. A Yes, I think the number is around \$110,000, but
3. what you say is true.

4. Q That figure doesn't appear anywhere in that
5. report, does it?

6. A That's right. I'm sorry, can I just correct one
7. thing.

8. Q Sure.

9. A It would be the one hundred and whatever thousand
10. dollars plus or minus the impact of any subject's collections
11. on the Biafra receivables.

12. Q But there is no place you can go to in this report
13. and pick out a number and say, this is what Arthur Andersen
14. says constitutes the combined tangible net worth of the
15. company, right?

16. A I am not sure that I appreciate your question. If
17. you mean open to page 1 and say that number is X, what you
18. say is true, but if you are asking me can I read that report
19. and see what it is, your comment is false. You understand
20. the distinction.

21. Q Yes. You, as an accountant, can read this report
22. and determine what, in Arthur Andersen's opinion, was the
23. combined tangible net worth of the company, right?

24. A Yes.

25. Q But me, since I am not an accountant, there is

2 no place I can pick up this report and turn to a page and say,
3 Arthur Andersen says these companies have a combined tangible
4 net worth of \$138,000.

5 A That is true.

6 Q That is true?

7 MR. LATMAN: I object.

8 THE COURT: In the first place, the report speaks
9 for itself.

10 Q Exhibit G also reflected the opinion of Arthur
11 Andersen at August 18, 1969; is that right?

12 A That's right.

13 Q And Exhibit G states that it was prepared to
14 enable us to express the opinion required by paragraph 3.6 of
15 the agreement as of July 9, 1969, and it states that in
16 substance, the combined tangible net worth is a deficit of
17 approximately \$125,000. Do you see that?

18 A Yes.

19 Q Was that Arthur Andersen's opinion as of August
20 1969?

21 A Yes.

22 Q And that opinion changed between August 18, 1969
23 and the date of this report, Plaintiff Exhibit 3?

24 A Yes.

25 Q Was Exhibit G ever sent to CELSA, do you know?

1 jwrm

Jerram-cross

70

2 A I don't know.

3 Q It is directed to the Board of Directors of ITT
4 World Directories, sir. Do you see that?

5 A Yes.

6 Q You have no knowledge whether or not CELSA ever
7 received it?

8 A No, I don't know.

9 Q Do you know whether Arthur Andersen ever sent a
10 document to ITTWD stating that the opinion which was given in
11 the letter of August 18, 1969 was wrong and had been changed
12 in any respect?

13 A I don't know.

14 THE COURT: Clarify a point for me. Is there one
15 of these reports that says that 138 is --

16 MR. HAWKE: One dated August 18, 1969.

17 THE COURT: What is the number of that? That says
18 a deficit of 1.5?

19 MR. HAWKE: Yes.

20 THE COURT: And which is the one that says 138?

21 MR. HAWKE: Exhibit 3.

22 THE COURT: All right, then I have it straightened
23 out.

24 Q You were aware that the contract between ITTWD and
25 CELSA required that Arthur Andersen and Company deliver as

2 soon as possible the closing of the contract, one, a certified
3 balance sheet of the company as of May 31, 1969 and, two, a
4 certificate setting forth the tangible net worth of the
5 company as of May 31, 1969.

6 Apart from Defendant's Exhibit G, which says there
7 is a net worth deficit of \$125,000, did Arthur Andersen and
8 Company ever deliver the document called for in item 2, the
9 certificate setting forth the tangible net worth of the
10 company as of May 31, 1969?

11 A I believe so.

12 Q What are you referring to?

13 A I think it is Exhibit 3. It is the brown cover
14 report.

15 Q The brown cover report?

16 A Yes.

17 Q So the brown cover report then constituted both
18 items 1 and 2 called for under the contract; is that correct?

19 A I believe so.

20 Q You will notice, as I pointed out earlier in
21 Exhibit C, the engagement letter of May 23, 1969, which stated,
22 "Additionally, you will furnish us with a separate statement
23 of the net worth of Bertrand." Was a separate statement of
24 that net worth ever furnished?

25 A I believe not.

2 Q Exhibit F, which is the telex of you and Mr. Soto
3 dated August 5, 1969 refers back to Benckert's original letter
4 of instruction and asks "for a substantial amount of detail on
5 specific accounts as of December 3, 1969. We have been
6 presuming that he required the same detail as of May 31, 1969."

7 Did Mr. Benckert ever tell you that the detail
8 called for in the last paragraph of his original letter of
9 instruction was no longer called for?

10 A Do you mean did Mr. Benckert ever tell me personally?

11 Q Or to your knowledge, tell Arthur Andersen and
12 Company.

13 A I don't have a recollection of that.

14 Q Did Mr. Arthur in his discussions with you ever
15 agree that either the exception with respect to the quota
16 holders or the exception with respect to the depreciation was
17 well founded?

18 A I don't think so.

19 Q Do you know whether or not under the contract
20 CELSA had a right to arbitrate any dispute it had with Arthur
21 Andersen and Company?

22 THE COURT: That is not disputed, is it?

23 MR. LATMAN: It isn't, your Honor.

24 MR. HAWKE: Withdraw the question.

25 I have no further questions, your Honor.

2 THE COURT: Let me ask you about these quota
3 holders. As I understand, there were five quota holders; no
4 more than five?

5 THE WITNESS: No, there were more. There were
6 five quota holders who owned this 7.9% of the company.

7 THE COURT: Well, that is the only thing we are
8 involved with here; is that right?

9 THE WITNESS: That's right.

10 THE COURT: As far as we are involved with, there
11 were only five.

12 THE WITNESS: That's right.

13 THE COURT: It is possible to be a quota holder
14 and never receive a quota if you continued in the employ of
15 the company as far as they were concerned? These two fellows
16 you are talking about that did not qualify because they were
17 still working and had been discharged, were they entitled to a
18 quota?

19 THE WITNESS: Yes, they were entitled to their
20 normal share of the profits.

21 THE COURT: As a quota holder or as an employee?

22 THE WITNESS: As a quota holder.

23 THE COURT: You seem to make a distinction between
24 them at one time there which did not quite get to me. But I
25 am clear now that regardless of whether they were discharged

2 or not, they were quota holders, receiving quota benefits.

3 THE WITNESS: That's right, they were receiving
4 certain quota benefits. A quota holder is really a stock-
5 holder, and a quota holder is entitled to a share of the
6 profits equal to his share in the equity of the company.

7 THE COURT: That is regardless whether he was an
8 employee or not?

9 THE WITNESS: That's right. But three of these
10 quota holders were entitled to draw out a sum each month really
11 by way of advance on profits. And two more of them, if they
12 left the company's employment, would be entitled to draw it.

13 THE COURT: Would also get that additional right.
14 I understand.

15 REDIRECT EXAMINATION

16 BY MR. LATMAN:

17 Q In that last connection, did Mr. Arthur agree that
18 CELSA had a continuing obligation to make payments to these
19 quota holders?

20 A No, not CELSA.

21 Q Did the management of Bertrand under CELSA's
22 control express a view as to whether Bertrand would have a
23 continuing obligation to make payments to quota holders?

24 MR. HAWKE: I object to the form of the question.
25 Unless you can identify the particular conversation with someone

2 at a particular time.

3 THE COURT: We are talking about Arthur. The
4 point is had Arthur ever agreed there was such an obligation
5 but simply did not think there should be a reserve. That is
6 what his answer has been to this point.

7 His answer is, since he thought there would be
8 profits as far as the 7.9 is concerned, there was no need to
9 have a reserve. Isn't that it?

10 THE WITNESS: Yes.

11 THE COURT: He did not dispute they were entitled
12 to profits?

13 THE WITNESS: That's right.

14 MR. LATMAN: He did dispute the fact that they
15 were entitled to payments.

16 THE COURT: You are talking about advances now
17 whether they are profits or not.

18 MR. LATMAN: That's right, and I am asking whether
19 Bertrand, under CELSA's controls, that is, whether Mr. Arthur
20 agreed that Bertrand had continuing obligation to make pay-
21 ments.

22 Q Did he?

23 A Yes, he did indicate to me that Bertrand had that
24 continuing obligation.

25 Q And is that reflected at the bottom of page 8 of

2 Plaintiff's Exhibit 3.

3 A Yes.

4 Q Would you, for convenience, read to the Court that
5 sentence that you have reference to?

6 A "While the company" -- that is to say Bertrand --
7 "has not obtained a conclusive legal opinion concerning its
8 obligation to make advances in the absence of applicable
9 profits, management believes that the company does have this
10 obligation."

11 Q Now, on cross examination you testified that Mr.
12 Arthur was of the opinion that future profits would be
13 sufficient to fund those payments; is that correct?

14 A Yes.

15 Q Had past profits been sufficient to fund the pay-
16 ments made up through May 31, 1969?

17 A No.

18 Q And is that in connection with that that Mr.
19 Arthur agreed to a write-off of the amounts by which the
20 payments had exceeded the profits as of May 31, 1969?

21 A Yes.

22 Q Turning to the 1968 report, was your review of
23 the work and procedures followed in connection with the August
24 31, 1968 report sufficient for you to compare or contrast, as
25 the case might be, the procedures that you were requiring in

2 order to account for depreciation in 1969 as opposed to the
3 procedures used in 1968?

4 MR. HAWKE: I object in view of the fact the
5 witness said he didn't even work on that 1968 report.

6 MR. LATMAN: Your Honor, he was questioned in
7 some detail about it and indicated he was familiar with the
8 procedures, and I am trying to pinpoint that.

9 THE COURT: It seems to me whether he worked on
10 it or not is immaterial, but in fact, he was able to consult
11 and discover whether, in his own mind, they followed the same
12 procedures. As a matter of fact, this has arisen because at
13 one point here -- the exception actually in the '68 report was
14 that the accounting practices were like a yo-yo, that one
15 time they did one thing and another time did another thing.
16 That is the inference I got from that, and that is what they
17 are claiming about in the '68 report. That is in the
18 exception.

19 I do not know if he has read it sufficiently to
20 form a judgment on that and what the areas are involved in
21 that. If he has, I think it is pertinent. If he has not,
22 then of course, he won't answer the question.

23 MR. LATMAN: My question was whether he was able
24 to compare the depreciation of accounting procedures used in
25 connection with the '68 report with those used in connection

2. with the '69 report.

3. A Yes, I was able.

4. Q And would you describe any differences that there
5. were?

6. A Yes. In the audit which was performed as of
7. August 31, 1968, I think in general there was available to the
8. members of Arthur Andersen, who conducted that audit, sub-
9. stantially less detailed evidence than was available by May
10. '69. In the interim period, the accounting employees of
11. Bertrand had put together detailed records item by item on the
12. machinery and equipment item indicating original cost, date
13. of acquisition, description of the item and the amount of
14. depreciation which had been accumulated up to that time on
15. each item.

16. From my recollection of the August '68 working
17. papers, no such record was available at the time of the
18. earlier audit.

19. Q The 19 --

20. THE COURT: That is actually a difference in
21. degree rather than a difference in kind, though, isn't it?
22. In other words, they did not, for example, radically change
23. the calendar to a financial year?

24. THE WITNESS: No, that is true.

25. THE COURT: They did not do anything different in

2. kind. They simply got more details in this particular area.

3. THE WITNESS: That is true.

4. THE COURT: The same statements could have been
5. made.

6. THE WITNESS: Yes, the same judgments could have
7. been made. There was, however, one additional factor which I
8. think was relevant. At the time of the May 1968 audit --

9. MR. LATMAN: Excuse me, May, 1969?

10. THE WITNESS: No, excuse me. At the time of the
11. August 1968 audit the entire production facilities of Bertrand
12. were located in one place at Dafundo in Portugal. There were
13. commitments for the acquisition of some land, oh, ten or
14. twelve miles away. There was also the commitment for the
15. acquisition of substantial new machinery which would supersede
16. quite a lot of the existing machinery. The existence of the
17. commitment to acquire the machinery was not known by the Arthur
18. Andersen people who did the audit in August 1968. Whether
19. they didn't inquire, I don't know, but they were not aware of
20. that commitment.

21. By May of 1969 we were aware of that commitment
22. and this would have, let's say, a qualitative impact on the
23. amount of work we would do on determining the adequacy of the
24. depreciation reserve on the existing equipment.

25. Q. What office of Arthur Andersen was in charge of

2. the May 31, 1969 audit of Bertrand.

3. A Madrid.

4. Q What office of Arthur Andersen was in charge of
5. the August 31, 1968 audit?

6. A Also Madrid.

7. Q And was there any other office of Arthur Andersen
8. that was consulted with the '68 audit?

9. A Yes.

10. Q Which was that?

11. A The Rio de Janeiro office.

12. Q Do you know why the Rio de Janeiro office was
13. involved?

14. A Yes.

15. Q Why?

16. A There was - and I have a recollection of reading
17. this, but don't remember the date of it - towards or at the
18. close of the 1968 audit there was an exchange of telexes
19. between the Madrid and Rio de Janeiro offices of Arthur
20. Andersen in which --

21. MR. HAWKE: I object to this, sir.

22. MR. LATMAN: Your Honor, I am trying to show a
23. distinction between these two audits and I suppose I could
24. simply again ask the witness whether he knows why the Rio de
25. Janeiro office was involved.

2 THE COURT: He is talking about matters which we
3 do not have before us, they are not marked in any way and
4 it is his recollection. The best evidence of those would be.
5 the telexes themselves. That is why I am sustaining the
6 objection.

7 MR. LATMAN: We are going into the question of his
8 familiarity with the 1968 audit, and we have summarized that
9 in his testimony. In other words, this is another phase of
10 that.

11 THE COURT: I realize that, but when he states or
12 makes statements about documents not in evidence and that we
13 have no recourse to at this time that I am aware of, I would
14 sustain that. If he wants to say why the Rio de Janeiro
15 office was involved without giving his mental process for it,
16 that may not be objectionable.

17 Q If you can, Mr. Jerram, would you tell his Honor
18 why the Rio de Janeiro office was involved.

19 A Because the Madrid office of Arthur Andersen was
20 proposing to increase the depreciation reserve by an amount of
21 five million escudos.

22 Q What did the Rio office have to do with the whole
23 picture?

24 MR. HAWKE: I object to the whole question, your
25 Honor.

2 THE COURT: All right. Was there any profit of
3 the corporation in Brazil?

4 THE WITNESS: No, the Rio de Janeiro office was
5 the office of Arthur Andersen which had been responsible for
6 referring the work to the Madrid office.

7 MR. LATMAN: Well, I don't think there is any
8 mistake. I think it will be stipulated that the main office
9 of CELSA is in Brazil. Will that not be stipulated?

10 MR. HAWKE: No, it will not be stipulated.

11 MR. LATMAN: I ask counsel to stipulate that the
12 main office of the controlling interest in CELSA was in Brazil.

13 MR. HAWKE: I won't stipulate to that, either.

14 THE COURT: In any event, this seems to be an
15 internal thing so I do not know what the relevancy of it is
16 as far as ITT is concerned. One office is telling another
17 office deprecate it by 5.6. So what? How does it bind ITT?

18 Q. Do you know whether the August 1968 audit was done
19 as part of any consolidated audit being performed by Arthur
20 Andersen?

21 MR. HAWKE: Objection, your Honor. I don't think
22 it is relevant.

23 THE COURT: I will take a yes or no on that, if
24 he knows.

25 A Yes.

2 Q What was the other enterprise or enterprises with
3 which the CELSA, the Bertrand audit was being consolidated,
4 if you know?

5 MR. HAWKE: Objection, your Honor.

6 THE COURT: I cannot see the relevancy at this
7 point, but I will take it subject to connection.

8 A I don't know.

9 Q Did the question of the materiality in the accounts
10 of the depreciation of Bertrand come up in connection with the
11 1968 audit?

12 MR. HAWKE: I object. I don't think the witness
13 has any competence to testify to that. We can read the report.
14 But to go back and ask now about a question of materiality --

15 THE COURT: I think we have had enough of the
16 comparison of these two reports anyhow. I think the areas of
17 interest to the Court have been covered by both sides. You
18 seem to be going into an area which, at this point, I do not
19 quite see myself..

20 MR. LATMAN: I have no further questions.

21 MR. HAWKE: If I may pursue one more question.

22 RECROSS EXAMINATION

23 BY MR. HAWKE:

24 Q In the 1969 report the exception on depreciation
25 had to do with the consistency of the method of depreciating

2. machinery which had been acquired in 1960 and prior; is that
3. right? Primarily machinery acquired in 1960 and prior.

4. A Yes.

5. Q And you found that there was an inconsistency with
6. respect to how that machinery had been treated in prior years?

7. A Yes.

8. Q Which prior years, going back how far?

9. A Generally between the date of acquisition and
10. 1964 or '65.

11. Q And from 1964 on, the company had applied
12. consistent accounting principles?

13. A I believe so, yes.

14. Q So that if there was an inconsistency noted in the
15. May 1969 audit, with respect to the 1960 machinery, that same
16. inconsistency would be within the company's balance sheets as
17. of August 1968; is that right?

18. A Yes.

19. Q Is it correct that a balance sheet can fairly
20. present the financial condition of a company as of a particular
21. date whether or not it is consistent with financial statements
22. prepared ten years earlier?

23. A Could you ask me the question again, please?

24. Q Yes.

25. A Sorry.

2. Q Isn't it correct that the financial statement of
3. a company as of a particular point in time, for example, May
4. 31, 1969, that that financial statement can fairly present
5. the financial condition of the company as of that date whether
6. or not it is consistent with accounting principles applied
7. in financial statements ten years earlier?

8. A Yes, that is true.

9. Q So that consistency is only necessary if you are
10. attempting to compare balance sheets, isn't that correct?

11. A I am sorry, I don't know what you are trying to
12. ask me. I would like to help you, but --

13. MR. HAWKE: I will withdraw it.

14. Q In other words, even if accounting principles in
15. the May 31, 1969 financial statement were inconsistent with
16. certain principles used in 1960, it is still possible on a
17. theoretical basis that the May financial statement could
18. fairly represent the financial condition of the company as of
19. that date, isn't that right?

20. MR. LATMAN: I object to the form.

21. THE COURT: I think he answered it.

22. MR. HAWKE: For my edification, is the answer yes?

23. THE COURT: I think he did answer yes before. But
24. it is in the record so you will make your arguments on what
25. is in the record.

2. But what I do not understand is this. Let's take
3. a concrete case. You have got a piece of machinery. A fellow
4. says I am going to depreciate this in twenty years at ten
5. dollars a year. He does that for a period of time and all of
6. a sudden he says, oh, no, I am going to depreciate this now
7. for twenty years or thirty years or some other years; are
8. those the kind of inconsistencies you are talking about?

9. THE WITNESS: Yes.

10. THE COURT: So whether there is an inconsistency
11. back before '64 actually has no relevancy to the report of '69
12. because by that time he has reached a place where he is getting
13. toward the end of the depreciation and if that is consistent
14. with practice at that point, then it is all right?

15. THE WITNESS: I think I would have a different
16. interpretation which is this: Let's take a concrete example
17. that you acquire a piece of machinery for a hundred thousand
18. dollars and you estimate that its useful service life will be
19. ten years, then naturally as in your example, you pick up ten
20. thousand dollars -- you record ten thousand dollars worth of
21. depreciation per year, and at the end of ten years, of course,
22. you have a fully depreciated item which has no further service.

23. THE COURT: Now it is the 8th year and instead of
24. doing that, I am going to do it in twenty years.

25. THE WITNESS: If the service life is ten years and

2. does it over twenty when it is of no more use, he still has
3. some depreciated cost. This is the subject of the exception.
4. To go back to your example, here we had a man who acquired a
5. hundred thousand dollars worth of equipment in 1969 and in
6. five years he did not depreciate it at all.

7. THE COURT: Then he started to pick up the
8. depreciation that he was entitled to?

9. THE WITNESS: But without correcting what the
10. depreciation which had been omitted in the prior years.

11. THE COURT: Essentially when you get to '69, that
12. makes no difference at that point. He did something which he
13. should not have done, but it straightens out by the time you
14. get to '69.

15. THE WITNESS: No, by 1969 he is still on it
16. accumulated by five million escudos, one hundred thousand
17. dollars. He's got a depreciated cost, he's got a cost not
18. recoverable from future revenue but which is still there.

19. Q. Mr. Jerram, when CELSA took over Bertrand, do you
20. know whether or not they accelerated the depreciation or
21. extended it? In other words, in the example the Court gave
22. about changing from a ten year to a twenty year basis, is
23. that what CELSA did or did they, in fact, do the contrary,
24. reduce the depreciation schedule?

25. A. I don't believe I can answer that question exactly.

2. An approximation is that when CELSA - the CELSA group acquired
3. a controlling interest in Bertrand, I believe from recollec-
4. tion that they instituted a policy of depreciating all of the
5. outfit's assets on the basis of their useful lives.

6. Q. Ten year life was it, do you know?

7. A. Whatever it was.

8. THE COURT: Starting at that point in time?

9. THE WITNESS: Yes.

10. THE COURT: They had already given up the
11. depreciation which they could have taken which they didn't
12. take?

13. THE WITNESS: That's right, but without correction
14. of the prior understatement.

15. Q. They started the depreciation schedule which
16. depreciated the equipment more rapidly than the prior owners
17. had done, isn't that so?

18. A. Yes.

19. Q. So instead of, let's say, in the judge's example,
20. instead of increasing it from a ten year to a twenty year
21. they, for example, reduced it from a fifteen to a ten year
22. life; is that right?

23. A. That is right, but still out of phase.

24. MR. HAWKE: I have no further questions, your
25. Honor.

2. MR. LATMAN: If we can just pursue that a little
3. more to clarify it.

4. REDIRECT EXAMINATION

5. BY MR. LATMAN:

6. Q A depreciation reserve does what to the net worth?
7. In other words, what is the effect of a depreciation amount
8. in a depreciation reserve on the net worth?

9. A If the depreciation reserve is increased, the net
10. worth is reduced.

11. Q So if the depreciation in this case was not as
12. large as it should have been, then the net worth would have
13. been inflated or overstated; is that correct?

14. A Yes.

15. Q Let's go back to that example of the machinery
16. bought in 1959 at one hundred thousand dollars. In 1964 when
17. CELSA's controlling interest took over, did they then begin
18. depreciating on that machinery from 1964 onward?

19. A Yes.

20. Q They never used the ten year principle. By 1969
21. how much would be in that reserve starting in '64?

22. A For one hundred thousand dollar machinery, \$50,000.

23. Q And how much should have been in that reserve?

24. A One hundred thousand dollars.

25. Q Because of the 1959 through 1964 period, is that

2 correct?

3 A That is correct.

4 Q So it does not straighten itself out necessarily,
5 does it?

6 A No.

7 Q Therefore, when you testified before that from
8 1964 on it applied the depreciation consistently it still,
9 CELSA still didn't pick up that early depreciation, did it?

10 A That's right, it didn't.

11 MR. LATMAN: All right.

12 RECROSS EXAMINATION

13 BY MR. HAWKE:

14 Q Mr. Latman was asking you if they started
15 depreciating this pre-1960 machinery when CELSA took over in
16 1964. They didn't start from scratch as though it was a brand
17 new piece of equipment, did they? They took the depreciation
18 that was on the books and then continued with a new accelerated
19 schedule.20 THE COURT: There was not any depreciation on the
21 books.

22 MR. HAWKE: It had been.

23 THE COURT: Not in the example we gave. He said
24 for the first five years they didn't depreciate it at all.
25

THE WITNESS: That's right. Of course, the Court

2 realizes this is an oversimplification.

3 Q That is an example.

4 A Yes.

5 Q But in this case there was depreciation on the
6 books for the pre-1950 machinery at the time CELSA took over,
7 but they instituted a new schedule which had this schedule
8 been applied backwards would have changed the results?

9 A That's right.

10 Q Isn't it correct though that as of 1969 the book
11 value shown by the company could fairly and accurately present
12 the financial condition of the company despite prior
13 inconsistencies in the year 1960? That is a possibility,
14 isn't it?

15 MR. LATMAN: I object to that. It is speculative.

16 MR. HAWKE: I withdraw the question. I think it
17 has been answered. No further questions.

18 MR. LATMAN: No further questions, your Honor.

19 THE COURT: I thought we had a tennis match here
20 with the back and forth of this witness. You are excused.

21 (Witness excused.)

22 THE COURT: Since we are going onto a new area,
23 we will recess at this time until 2:15.

24 (Luncheon recess.)

25

2. AFTERNOON SESSION

3. 2:15 p.m.

4. MR. LATMAN: Your Honor, although the entire
5. stipulation of fact is in evidence, I would like simply to
6. read two portions. Of course, the defendant may read any
7. other portions that he wants. I just think it would make
8. an orderly presentation if I put two facts into the record.

9. THE COURT: All right.

10. MR. LATMAN: I am reading from Paragraph 21.

11. "On October 23, 1969, John Morrison, manager of
12. accounting for ITTWD, prepared a memorandum for Mr. Berger
13. setting forth calculations which were made to determine the
14. combined net worth of PLT and Bertrand and the amount due for
15. the Dafundo plant 'as per purchase agreement.' Morrison's
16. memorandum stated that the 'Net Worth Per A.A. report' -- and
17. I think it is stipulated that A.A. refers to Arthur Andersen
18. -- "was 14,062,780 escudos": or \$492,221. The memorandum
19. computed the total amount that ITTWD was obligated to pay
20. CELSA as \$803,239."

21. And the first sentence of stipulated fact 23:

22. "On October 31, 1969, ITTWD delivered to CELSA's
23. attorney a check for \$803,239."

24. Your Honor, since the rest of this is in evidence,
25. I won't read any other portion. Plaintiff rests.

2. MR. HAWKE: So there is no confusion as to its
3. admissibility in evidence, Defendant's Exhibit B marked
4. previously.

5. THE COURT: It will be received.

6. MR. LATMAN: That's right.

xx 7. (Defendant's Exhibit B received in evidence.)

8. MR. HAWKE: Your Honor, I would like at this point
9. to make a motion for a directed verdict. Plaintiff has rested
10. and I think it seems to me to be absolutely clear that they
11. have not even begun to show the slightest showing of prima
12. facie case here. A mistake was made. The mistake has to do
13. with an intention, with the frame of mind, with an intent,
14. absolutely not one iota of evidence here elicited by plaintiff
15. that anybody made any statement on the part of plaintiff.

16. THE COURT: It is pretty clear, I think, that if
17. it is anything at all, it is a unilateral mistake. Is that
18. agreed?

19. MR. HAWKE: Giving that the most favorable
20. interpretation, yes.

21. MR. LATMAN: As far as what is shown thus far.

22. THE COURT: It is a unilateral mistake. There has
23. been no showing of fraud, there has been no showing of
24. coercion, there has been no showing of the awareness on the
25. part of the defendant that there was a mistake in the mind of

2 the plaintiff.

3 MR. LATMAN: What there is, your Honor, is an
4 agreement which provides for a certain procedure and a certain
5 amount. That has been put in evidence. What has also been
6 shown is the amount that was actually paid and it is the
7 plaintiff's position that, since the amount that was actually
8 paid was more than what the evidence shows was called for,
9 a restitution is improper.

10 MR. HAWKE: That is an inference that is utterly
11 unsupported by any evidence in this case. There is an agree-
12 ment which provides that certain payments would be made
13 provided that that amount as certified to by Arthur Andersen
14 is not in dispute. Arthur Andersen never delivered a net
15 worth certificate as provided under the engagement letter or
16 as required by the contract. They delivered instead a report
17 which your Honor has seen which, if one puts it together --

18 THE COURT: Suppose they had delivered it, what
19 difference would that make essentially? I mean, the point
20 is, there is nothing that you did on the part of the defendant
21 which lent anything to the mistake that was made by the
22 plaintiff. All the things that happened here were done by
23 the plaintiff all by himself without any help at all from
24 the defendant. And I don't know whether there is any showing
25 here of any obligation on the part of the defendant to do

1 jwrm

95

2 anything but accept the money that was given to him.

3 MR. LATMAN: We are relying on the authorities
4 and on Mirandas assuming there was an overpayment, assuming
5 your Honor would find on the basis of the evidence thus far
6 that there has been an overpayment regardless of the good
7 or bad faith of the defendant, regardless indeed of even
8 whether the plaintiff was negligent or not, the cases show
9 that restitution was proper. In other words, if the payment
10 is made, for example, in one of the cases I can think of by
11 an insurance company on the proceeds of an insurance policy
12 without deducting the amount of the loan, that even though
13 the insured does nothing and has no particular state of mind,
14 the insurance company is entitled to restitution.

15 THE COURT: That, I think, is distinguishable.
16 Where they do not take off the amount of the loan, that is
17 not comparable to the case here. This is arms length bargaining
18 for a business which is supposedly worth something that
19 the accountant is going to say it is actually worth, plus or
20 minus. And that is the figure that is going to control. Now,
21 your people using your own accountant apparently came to a
22 conclusion.

23 This is a law action. This is not an equity
24 action.

25 MR. LATMAN: Right, your Honor.

2. THE COURT: The aspect of what you are talking
3. about might be good in an equity action and you might say
4. all right, do something about an equity, but we are not in
5. equity at this time. This is not an action in equity that I
6. am aware of.

7. MR. LATMAN: It is an action for restitution,
8. your Honor.

9. THE COURT: But I do not know that it is -- well,
10. let me put it to you this way: I have not had a sufficient
11. time to read the cases that you have handed to the Court. And
12. so that since this is a non-jury case, I am going to reserve
13. decision on this point and the defendant can then proceed with
14. any statements he sees fit. If they feel so strong about it
15. that they are right, they might rest, I do not know. On the
16. other hand, if they feel they have something to bolster their
17. case provided this point is not followed by the Court, is not
18. agreed with by the Court finding, that is a judgment they
19. will have to make. I am not suggesting they do anything
20. except exercise whatever rights they feel they have. I will
21. reserve decision on the motion.

22. MR. HAWKE: Your Honor, may we have a little time
23. to confer among ourselves?

24. THE COURT: Yes. Why not? All right. Tell me
25. when you are ready to proceed and I will be back again.

1. jwrm

97

2. (Recess)

3. MR. HAWKE: Your Honor, the defendants rest.

4. MR. LATMAN: Your Honor, the plaintiff moves to
5. dismiss the counterclaim of which there has been no proof at
6. all.7. THE COURT: There has not been any proof on the
8. counterclaim.9. MR. HAWKE: Well, there is evidence at the time
10. the payment was made a receipt was given that the statement
11. constituted partial payment in paragraph 23 and in paragraph
12. 24 that --13. THE COURT: I tell you what you are saying is that
14. you have got arguments otherwise, but the point is at this
15. stage of the game now, what I am going to do is reserve
16. decision on both of your motions and you can submit post-
17. trial briefs now with findings of facts and conclusions of
18. law geared to the testimony in the case. And then I will get
19. a chance to read any additional cases that you want to submit
20. since you are satisfied there is no further proof you
21. desire to prove.

22. MR. HAWKE: Yes, your Honor.

23. THE COURT: All right. So then you are moving for
24. judgment on the counterclaim. He is moving for judgment on
25. the complaint. I reserve the decision on both.

129a

2. MR. HAWKE: Thank you, your Honor.

3. MR. LATMAN: Thank you, your Honor.

4. THE COURT: How much time do you want on your
5. briefs?

6. MR. LATMAN: Two weeks after we get the record.

7. THE COURT: When I get them I will start reading
8. them.

9. MR. HAWKE: Your Honor, what procedures does the
10. Court want us to follow?

11. THE COURT: Exchange briefs.

12. MR. HAWKE: And then submit them to the Court at
13. that point?

14. THE COURT: Yes.

15. MR. HAWKE: May we have three weeks after the
16. record becomes available?

17. THE COURT: We will give you three weeks now. If
18. you find you are hung up, come back to me.

19. MR. LATMAN: Apparently the record will not be
20. available for two weeks.

21. THE COURT: Make it five weeks from today. Is
22. that convenient?

23. MR. LATMAN: Yes, your Honor.

24. THE COURT: All right.

25. MR. HAWKE: Your Honor wants proposed findings of

2 fact, conclusions of law and supporting memoranda; is that
3 correct?

4 THE COURT: If you feel the memorandum which was
5 submitted on the law is sufficient, well and good, it is all
6 right with me, but if you want to submit any additional cases,
7 simply make it an addenda to your previous memorandum. Yours
8 were all submitted yesterday.

9 MR. HAWKE: Monday, your Honor.

10 THE COURT: Yesterday was a holiday, so I did not
11 get to see it at all. Yours I know was here before.

12 MR. LATMAN: Friday.

13 THE COURT: If you feel the cases are all there,
14 there is no need to supply a memorandum for the sake of
15 supplying one. I would just suggest you submit any
16 additional cases you want me to look at.

17 MR. HAWKE: May we have an opportunity to submit
18 a brief in argument, your Honor?

19 THE COURT: Yes. The state of the evidence now
20 is different from what it was when you started to look into
21 this, so you are much better off if you can start de novo
22 with your brief and then I won't have to go digging back into
23 what you said before. However, I will leave it up to you.

24

25

MEMORANDUM DECISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x -----
ITT WORLD DIRECTORIES, INC., : Plaintiff,
: 71 Civ. 5496
-against- : (JMC)
CIA. EDITORIAL de LISTAS, S.A. and :
EDITORIAL de GUIAS LTD., S.A., :
: Defendants.
----- x -----

MEMORANDUM DECISION AND ORDER

CANNELLA, D.J.:

The instant action for the return of money allegedly paid under a mistake of fact was tried to the Court without a jury on February 13, 1974. The plaintiff, ITT World Directories, Inc. ["ITTWWD"], a Delaware corporation, brought this diversity action alleging that it had mistakenly overpaid the defendant, CIA Editorial de Listas, S.A. ["CELSA"], a Panamanian corporation, \$353,997 in connection with its acquisition of CELSA's wholly-owned subsidiary, Publicacoes da Listas Telefonicas, S.A.R.L. ["PLT"], a Brazilian corporation, and CELSA's 92.1 percent interest in Bertrand (Irmaos) Limitadas, a Portuguese quota company. For the reasons set forth

MEMORANDUM DECISION

below, the Court finds for the defendant and directs the entry of judgment dismissing the complaint with prejudice. As to the defendant's counterclaim, the Court finds for the plaintiff and directs the entry of judgment dismissing said counterclaim with prejudice.

THE FACTS

The following facts were established by a stipulation of the parties dated October 31, 1973 and entered into evidence at trial (Plaintiff's Exhibit 1):

1. On July 9, 1969, ITTWD, CELSA, and Tasec-Technical Advertising and Sales Engineering Corporation Ltd. [TASEC"] entered into an agreement (hereinafter "acquisition agreement") whereby ITTWD agreed to purchase and CELSA agreed to sell CELSA's wholly owned subsidiary, PLT, and CELSA's 92.1% interest in Bertrand.

2. The obligations of CELSA pursuant to the acquisition agreement were guaranteed by defendant LISTAS.

3. ITTWD, a subsidiary of International Telephone and Telegraph Corporation, is a corporation organized under the laws of Delaware and is engaged in the business of owning and/or operating telephone directory companies throughout the world.

MEMORANDUM DECISION

4. Defendant CELSA is a corporation organized under the laws of Panama. Prior to July 9, 1969 CELSA owned all of the issued and outstanding capital stock of PLT, a corporation organized under the laws of Portugal. CELSA was engaged in the publication of telephone directories in Portugal primarily through its subsidiary PLT.

5. Bertrand, a printing company, was organized under the laws of Portugal as a "quota company". 92.1% of its outstanding quotas were owned by defendant CELSA at the time of the acquisition agreement.

6. TASEC is a corporation organized under the laws of the Bahamas. At the time of the acquisition agreement it had management contracts both with CELSA and PLT.

7. On May 23, 1969, ITTWD requested Arthur Andersen & Co. in Madrid to perform an audit of the balance sheet of Bertrand as of December 31, 1968, and the statement of income for Bertrand for the year 1968. ITTWD further requested a "separate statement of the net worth" of Bertrand as of December 31, 1968, and as of the closing date, determined in accordance with a definition set out in the letter of May 23, 1969 (Defendants' Exhibit C).

MEMORANDUM DECISION

8. On May 28, 1969, Arthur Andersen & Co. acknowledged receipt of ITTWD's letter of May 23rd and agreed to perform the audits requested.

9. On June 5, 1969, ITTWD instructed Arthur Andersen to perform the audits as of the "latest closing date possible" instead of as of December 31, 1968.

10. On July 3, 1969, the Chairman of the Board of ITTWD, Ted B. Westfall, wrote a memorandum to Mr. Harold Geneen, Chairman of the Board of ITT, recommending that ITTWD acquire 100% of PLT and 92.1% of Bertrand pursuant to the terms set forth in his memorandum

11. On July 9, 1969, ITTWD, CELSA and TASEC entered into the acquisition agreement (Plaintiff's Exhibit 2). That agreement provided in relevant part as follows:

(a) ITTWD agreed to purchase from CELSA all of the issued and outstanding shares of capital stock of PLT for the sum of \$5,650,000 (\$3.1).

(b) TASEC agreed to cancel its management contracts with CELSA and PLT and as consideration therefor, ITTWD agreed to pay TASEC \$1,850,000 (\$3.2).

(c) CELSA agreed to sell to ITTWD, and ITTWD agreed to purchase from CELSA, CELSA's 92.1% interest in Bertrand (\$3.3).

MEMORANDUM DECISION

(d) ITTWD agreed to cause Arthur Andersen & Co. (or its affiliate) to audit the accounts of PLT and Bertrand as of May 31, 1969, and as soon as practicable after the closing of the contract to deliver to ITTWL and CELSA:

(i) "certified balance sheets of said companies as of May 31, 1969," and

(ii) "a certificate setting forth the tangible net worth of said companies as of May 31, 1969," computed in accordance with a formula set out therein (\$3.6).

(e) It was further agreed that as soon as practicable after receipt by ITTWD of "said certificate setting forth the tangible net worth" of PLT and Bertrand as of May 31, 1969, the following payments would be made:

(i) If at May 31, 1969 the tangible net worth of PLT "as set forth in said certificate" was positive, ITTWD would pay to CELSA an amount equal to such tangible net worth. If said net worth reflected a deficit, CELSA would repay to ITTWD an amount equal to said deficit.

(ii) If at May 31, 1969 the tangible net worth of Bertrand "as set forth in said certificate" was positive, ITTWD would pay CELSA an amount equal to

MEMORANDUM DECISION

92.1% of such tangible net worth. If said net worth reflected a deficit, CELSA would repay to ITTWD an amount equal to 92.1% of such deficit.

(iii) In addition, ITTWD would pay CELSA 92.1% of the amount by which the \$600,000 appraised value of Bertrand's plant at Dafundo, Portugal (less applicable taxes) exceeded the book value thereof as of May 31, 1969.

(f) Section 3.6 of the acquisition agreement further provided that the determination by Arthur Andersen & Co. of the tangible net worth of PLT and Bertrand "as set forth in the aforesaid certificate" would be final and conclusive unless within 20 days after receipt by CELSA of said certificate, CELSA delivered to ITTWD an objection in writing stating the amount by which CELSA believed the tangible net worth of these companies exceeded the "amount set forth in said certificate". If the matter in dispute was not resolved by negotiation within 20 days after receipt by ITTWD of said objection, the matter would be submitted for arbitration to a second firm of auditors selected jointly by ITTWD and CELSA.

(g) It was further agreed that \$4,750,000 of the purchase price would be deposited by ITTWD with Morgan Guaranty Trust Company of New York as escrow agent ["Morgan"] in accordance with an escrow agreement attached

MEMORANDUM DECISION

as Exhibit 2 to the acquisition agreement (§3.1). Said escrow agreement provided that said \$4,750,000 would be released by Morgan to CELSA upon:

(i) Receipt by Morgan of a certificate signed by Arthur Andersen & Co. stating that the combined net worth of PLT and Bertrand as of May 31, 1969 was not negative, or

(ii) Receipt by Morgan of a written direction signed by ITTWD to make such payment, or

(iii) The expiration of 40 days from July 9, 1969, unless Morgan shall have received a certificate signed by Arthur Andersen & Co. stating that the combined net worth of PLT and Bertrand was negative and setting forth the amount of such negative net worth. In the event Morgan did receive such a certificate of negative net worth, Morgan was to pay to CELSA only the amount of the escrow fund in excess of said negative net worth.

(h) It was further agreed that CELSA would deposit \$900,000 of the purchase price with Morgan to be held in escrow pursuant to Section 6.2 of the acquisition agreement (§3.1). Section 6.2 provided that \$450,000 of the \$900,000 escrow fund would be released to CELSA upon the expiration of 12 months from the closing, and the

MEMORANDUM DECISION

balance would be released upon expiration of 24 months from the closing, unless ITTWD made a claim against the escrow fund in accordance with the terms of the escrow agreement, in which event the escrow fund would be held by Morgan pending a determination of the claim in accordance with the terms of the escrow agreement.

12. A closing pursuant to the acquisition agreement was held on July 9, 1969.

13. On July 9, 1969 payments were made to the escrow funds as provided in the acquisition agreement and in the escrow agreements.

14. On August 18, 1969, Arthur Andersen & Co. sent a letter to the Board of Directors of ITTWD stating that it had examined the combined balance sheet of PLT and Bertrand as of May 31, 1969, and that its examination was made to enable it to express the opinion required by Paragraph 3.6 of the acquisition agreement and Paragraph C of the escrow agreement. Arthur Andersen & Co. stated that in its opinion the combined tangible net worth, as defined, of PLT and Bertrand was a deficit of approximately \$125,000.

15. On August 18, 1969, Pope sent to Victor M. Berger, Secretary of ITTWD, a memorandum which stated that it enclosed

MEMORANDUM DECISION

The original copy of the Arthur Andersen & Co. certificate applicable to the combined tangible net worth of PLT and Bertrand as of May 31, 1969 in accordance with Paragraph 3.6 of the agreement between ITT World Directories and the Portuguese companies.

16. On September 12, 1969, Berger received a telex from ITT in Lisbon stating that a draft of the Arthur Andersen report had been "sent to New York September 1 to be discussed with ITTWD in New York." The telex further stated that the report showed a combined net worth of 14,000,000 escudos and that there was "to be considered" an additional depreciation of 5,000,000 escudos and Bertrand pensions of 6,000,000 escudos, making a "net net worth" of approximately three million escudos.

17. Subsequent to September 1, 1969, Arthur Andersen & Co. issued its final Audit Report on the combined balance sheet of PLT and Bertrand as of May 31, 1969 (Plaintiff's Exhibit 3). The report was dated August 12, 1969.

(a) The combined balance sheet indicated a combined "stockholders investment" (or net worth) of 14,062,780 escudos.

(b) In the report, Arthur Andersen & Co. stated that Bertrand had not followed a consistent policy with respect to depreciation of machinery and equipment

MEMORANDUM DECISION

and that, as a result, the company's accumulated depreciation was estimated to be understated by approximately 5,000,000 escudos as of May 31, 1969.

(c) Arthur Andersen & Co. further stated, in its report and in Note 10 to the combined balance sheet, in substance, that it was estimated that the present capital value of the company's alleged future obligation to make certain payments to Bertrand family quota holders was 6,000,000 escudos and that no accrual had been made in the combined balance sheet for that amount.

(d) Arthur Andersen's report on the combined balance sheet took exception for the effect of the matters referred to in Paragraphs (b) and (c) supra.

18. On September 16, 1969, Berger sent a telex to ITTWD's counsel in Lisbon stating among other things

My understanding that payments to Bertrand minority shareholders against future profits provided for under Articles of Association may legally be stopped by us at present time. Please confirm this.

19. On September 17, 1969, ITTWD's counsel in Lisbon sent a telex to Berger stating that

Problem of Bertrand is very involved and it is not clear whether so called 'payments against future profits' can or not [sic]

MEMORANDUM DECISION

be legally stopped. As you know, we suggested negotiating rather than entering into legal action.

20. On September 17, 1969, Westfall met with Robert A. Arthur, a Vice President of CELSA and TASEC, at Westfall's office in New York.

21. On October 23, 1969, John Morrison, Manager of Accounting for ITTWD, prepared a memorandum for Mr. Berger setting forth calculations which were made to determine the combined net worth of PLT and Bertrand and the amount due for the Dafundo plant "as per purchase agreement." Morrison's memorandum stated that the "Net Worth Per A.A. report was 14,062,780 escudos": or \$492,221. The memorandum computed the total amount that ITTWD was obligated to pay CELSA as \$803,239.

22. On October 28, 1969, Morrison advised Mr. Duma in the Treasurer's Department of ITT that "In accordance with ITTWD's agreement to purchase Bertrand and PLT, ITTWD is obligated to pay CELSA \$803,239 for the net worth and Dafundo plant." He requested a check to be made out in that amount to Morgan.

23. On October 31, 1969, ITTWD delivered to CELSA's attorney a check for \$803,239. CELSA's attorney stated in a letter to ITTWD acknowledging receipt of that check that this was a "partial payment" to CELSA under

MEMORANDUM DECISION

section 3.6 of the acquisition agreement and that he understood that "an additional payment should be forthcoming after a final determination of the salvage value of the Bertrand machinery."

24. On or about February 10, 1970, ITTWD prepared and forwarded to CELSA's attorneys a recalculation of the purchase price paid for PLT and Bertrand. This recalculation indicated an overpayment of \$24,569 which represented 7.9% of the amount by which the appraised value of the Dafundo plant exceeded book value.

25. At the same time, Berger sent a note to CELSA's attorney, stating that

When salvage value is fixed we can work it out.

26. On July 9, 1970, ITTWD authorized the release to CELSA of \$450,000 from the \$900,000 escrow fund. No claim was asserted at that time against the escrow fund with respect to any alleged overpayment.

DISCUSSION

In its complaint, ITTWD asserts that it made an error in its October 31, 1969 payment to CELSA due to a mistake in computing the amount to be paid to CELSA pursuant to Section 3.6 of the acquisition agreement.

MEMORANDUM DECISION

Under the terms of said acquisition agreement and those of an engagement letter of May 23, 1969 (Defendant's Exhibit C), Arthur Andersen & Co. was to deliver to ITTWD and CELSA a certified balance sheet and a separate certificate setting forth the combined tangible net worth of the two companies, both documents to be as of May 31, 1969. Arthur Andersen never delivered the separate certificate of net worth, and ITTWD now alleges that it made a mistake of fact in computing the amount to be paid CELSA in that the combined net worth of Bertrand and PLT was mistakenly overstated by \$353,997. This error in calculation is said to arise from ITTWD's failure to properly read the August 12, 1969 balance sheet. More specifically, ITTWD claims that when calculating the amount of its October 31, 1969 payment to CELSA, it neglected to take into account the auditor's exception as to understated inventory and Note 10 of said report, referring to Bertrand's obligations to quota holders.

^{1/}
The law of New York^{1/} regarding the recapture of money paid under a mistake of fact is stated in

^{1/} Section 10.1 of the acquisition agreement provides that the agreement is to "be governed by and construed in accordance with the laws of the State of New York."

MEMORANDUM DECISION

Restatement of Restitution §20 (1937), as follows:

A person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty, for the performance of a condition, or for the acceptance of an offer, is entitled to restitution of the excess.^{2/}

Plaintiff's proof, however, fails to establish facts sufficient to bring it within the purview of this rule. At the trial, plaintiff did not present any facts which would establish that the overpayment of \$353,997 was a mistake rather than a purposeful decision. This total failure to present proof sufficient to establish even a prima facie case is, of course, fatal to plaintiff's claim.

The only witness to testify at the trial was Mr. Jeremy Jerram, an English accountant called by ITTWD. Mr. Jerram, who had been the Auditing Manager of Arthur Andersen's Madrid Office during the relevant period, was in charge of the audits of PLT and Bertrand conducted pursuant to the terms of the acquisition agreement. He offered no testimony relating in any way to the allegedly mistaken overpayment. His testimony did indicate, however, that as an accountant he was able to look at the

^{2/} See, e.g., Ball v. Shepard, 202 N.Y. 247, 253, 95 N.E. 719, 721 (1911); Hathaway v. County of Delaware, 185 N.Y. 368, 370, 78 N.E. 153, 154 (1906).

MEMORANDUM DECISION

Arthur Andersen report dated August 12, 1969 and determine therefrom that, in Arthur Andersen's opinion, the combined tangible net worth of PLT and Bertrand was \$138,000 (Transcript 68-69). Jerram also testified that Mr. Robert Arthur, Vice President of CELSA, had expressly indicated that CELSA disputed Arthur Andersen's conclusion (found at Note 10 of the August 12, 1969 report) that it was necessary to establish a reserve of 6,000,000 escudos (\$180,038) in order to reflect Bertrand's obligations to its quota holders (Transcript at 34-35, 56-57). Jerram further testified that Mr. Arthur had never agreed with the Arthur Andersen conclusion that Bertrand's accumulated depreciation had been understated by approximately 5,000,000 escudos (\$173,959) as a result of inconsistent accounting methods in regards to depreciation of equipment and machinery (Transcript at 72).

The significance of this testimony is that it raises the possibility that had ITTWD in fact taken the Arthur Andersen exceptions into account and determined its obligation under Section 3.6 of the acquisition agreement to have been \$138,224 rather than \$492,221, then CELSA would have exercised its right to object to the audit figures, which in turn could have necessitated a resort to arbitration as provided in the acquisition agreement. The testimony suggests the possibility that

MEMORANDUM DECISION

there was a bona fide dispute between the parties as to the actual combined tangible net worth of the two acquired companies, and that ITTWD's payment was the result of a conscious device rather than a mistake of oversight.

In addition, there is evidence that Mr. Victor Berger, ITTWD's Secretary, fully understood and was aware of the contents of the August 12 reports. On September 12, 1969, Berger received a telex from ITT (ITTWD's parent company) specifically stating that the Arthur Andersen report "showed a combined net worth of 14,000,000 escudos and that there was 'to be considered' an additional depreciation of 5,000,000 escudos and Bertrand pensions of 6,000,000 escudos, making a 'net net worth' of approximately 3,000,000 escudos." (Plaintiff's Exhibit 1 at Par. 16). In apparent response to this information, Berger, on September 16, 1969 sent a telex to ITTWD's counsel in Lisbon asking for a legal opinion regarding Bertrand's obligations to its minority quota holders (Plaintiff's Exhibit 1 at Par. 18). On September 17, 1969, Mr. Berger received a responsive telex from Lisbon counsel stating:

Problem of Bertrand is very involved and it is not clear whether so called 'payments against future profits' can or not [sic] be legally stopped. As you know, we suggested negotiating rather than entering into legal action. (Plaintiff's Exhibit 1 at Par. 19)

MEMORANDUM DECISION

In light of this knowledge on the part of Mr. Berger, and in light of the dispute as to the proper amount due and owing CELSA, plaintiff must do more than allege a mistake in their complaint and leave it at that. Some proof must be brought forth which would explain how it happened that between September 16, 1969, when Mr. Berger received the above-mentioned telex, and October 23, 1969 when he received a memorandum from his Accounting Department stating that "As per purchase agreement" the "Net worth Per A. [Arthur] A. [Andersen] report was 14,062,780 (escudos) [\$492,221]." (Plaintiff's Exhibit 1 at Par. 21), he forgot the contents of the earlier telex and did not notice that Mr. Morrison had made a "mistake" which would cost ITTWD \$353,997. Plaintiff, however, failed to present to this Court any evidence, either documentary or testimonial, which could be said to support their contention that the payment to CELSA was made under a mistake of fact.

Given this factual posture, plaintiff's reliance upon Gulf Oil Corp. v. Lone Star Producing Co., 322 F.2d 28 (5th Cir. 1963) is misplaced. In Gulf Oil, a Texas diversity case, the Court of Appeals for the Fifth Circuit reversed a district court ruling that plaintiff had not met its burden of proof due to a

MEMORANDUM DECISION

failure to call any witnesses from its Accounting Department to explain the mistaken overpayment.^{3/} Unlike the situation in the case at bar, there was testimony by one of plaintiff's employees stating that the overpayment had been the result of an error. Commenting upon this testimony, the Court of Appeals noted that

There was no evidence to the contrary. Under the circumstances of this case, we think that [plaintiff] sufficiently met its burden and, indeed, the evidence is undisputed that the overpayments were made under a mistake of fact.^{4/}

In addition, in the Gulf Oil case, there had been no prior dispute between the parties regarding the proper amount which plaintiff was to have paid to the defendant and no facts which even suggested the possibility that the overpayment was actually a negotiated settlement. In sum, there "was simply no explanation for the overpayments except that they were made by mistake of fact."^{5/} Thus, the Gulf Oil decision does not obviate the need for this plaintiff to prove its case.

3/ 208 F.Supp. 85, 91-92 (E.D.Tex. 1962).

4/ 322 F.2d at 32-33.

5/ Id. at 32.

MEMORANDUM DECISION

By contrast to the facts in the instant matter, recent New York decisions ordering the return of overpayments made due to mistakes of fact have turned on the plaintiff having explained to the court's satisfaction how the mistake occurred,^{6/} or there having been no evidence indicating that the overpayment was anything but a mistake.^{7/} In the instant matter, however, the evidence of Berger's full knowledge of the facts, when combined with the failure of ITTWD to adduce any facts establishing that it paid CELSA by mistake, mandates a finding that plaintiff has failed to sustain its burden of proof.

CONCLUSION

This Court therefore finds that the plaintiff has failed to prove by a fair preponderance of the credible evidence, that its October 31, 1969 payment to the defendant was made due to a mistake of fact. Accordingly, plaintiff's complaint is dismissed as to all defendants with prejudice and costs. As to the defendant's counterclaim,

6/ Greene & Ladd v. Bernstein, 39 Misc.2d 1062, 242 N.Y.S.2d 367 (Civ.Ct. 1963).

7/ Mutual Life Ins. Co. v. William B. Kessler, Inc., 25 Misc.2d 242, 202 N.Y.S.2d 92 (Sup.Ct. 1960). See also, Manufacturers Trust Co. v. Diamond, 17 Misc.2d 909, 186 N.Y.S.2d 917 (App.T. 1959).

MEMORANDUM DECISION

the court finds that no proof thereon was offered at the trial and said counterclaim is therefore dismissed with prejudice. Let the Clerk of the Court enter judgment accordingly.

The foregoing constitute the findings of fact and conclusions of law of the Court, pursuant to Rule 52(a) Fed.R.Civ.P.

SO ORDERED.

John M. Cannella
JOHN M. CANNELLA
United States District Judge

Dated: New York, N. Y.
October 3, 1974.

JUDGMENT

U.S. District Court
Filed
Oct. 8 1974
S. D. of N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before the Honorable John M. Cannella, United States District Judge, on February 13, 1974, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on October 4, 1974, having handed down its memorandum opinion, constituting its findings of fact and conclusion of law in favor of all defendants, it is,

ORDERED, ADJUDGED and DECREED: That defendants CIA EDITORIAL de LISTAS, S.A., and EDITORIAL de GUIAS LTD., S.A. have judgment against plaintiff ITT WORLD DIRECTORIES, INC., dismissing the complaint with prejudice and costs to be taxed, it is further

ORDERED: That the defendants' counterclaim be and it is hereby dismissed, with prejudice.

Dated: New York, N.Y.
October 8, 1974

s/Raymond S. Burghardt

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ITT WORLD DIRECTORIES, INC.,

Plaintiff,

71 Civ. 5496 (JMC)

-against-

CIA. EDITORIAL de LISTAS, S.A. and
EDITORIAL de GUIAS LTB., S.A.,

NOTICE OF APPEAL

Defendants.

-----x

NOTICE IS HEREBY GIVEN that plaintiff above
named appeals to the United States Court of Appeals for
the Second Circuit from so much of the Judgment entered
in this action on October 8, 1974, as dismisses plain-
tiff's complaint as to all defendants with prejudice
and costs.

Dated: New York, N.Y.
October 11, 1974

COWAN, LIEBOWITZ & LATMAN, P.C.

By

Alan Latman

A Member of the Firm
Attorneys for Appellant
Office & P.O. Address
200 East 42d Street
New York, N.Y. 10017
(212) 986-6272

STIPULATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ITT WORLD DIRECTORIES INC.,

Plaintiff,

71 Civ. 5496 (JMC)

-against-

STIPULATION

CIA. EDITORIAL de LISTAS, S.A. and
EDITORIAL de GULAS LTB., S.A.,

Defendants.

-----X
IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the following original exhibits admitted in evidence at the trial of the within action on February 13, 1974, shall be filed with the Clerk of this Court no later than October 30, 1974, so that said Clerk shall transmit the same, together with the record on appeal to the Clerk of the United States Court of Appeals for the Second Circuit:

1. Plaintiff's Exhibits 1 through 4 and
2. Defendants' Exhibits A through G.

[Signature]
COWAN, LIEBOWITZ & LATMAN, P.C.

By _____
A Member of the Firm
Attorneys for Plaintiff-
Appellant
200 East 42d Street
New York, N.Y. 10017
Tel. No. (212) 986-6272

BROWN, WOOD, FULLER, CALDWELL & IVEY

[Signature]
By _____
A Member of the Firm
Attorneys for Defendants-
Respondents
1 Liberty Plaza
New York, N.Y. 10006
Tel No. (212) 349-7500

COPY RECEIVED

~~RECORDED~~

DEC 24 1974

BROWN, WOOD, FULLER,
CALDWELL & IVEY

Attorneys for:

Defendants
By Harry Brownwell

